

## LESSONS FROM IMPROVEMENTS IN MILITARY AND OVERSEAS VOTING

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### I. INTRODUCTION

This article, part of the symposium's "Get Out the Vote?" panel, considers recent efforts to improve the voting experience of military and overseas voters and identifies some broader implications of those efforts on various early and absentee voting methods increasingly available to other U.S. voters. A number of recent measures to facilitate voting by military service personnel have generally received widespread bipartisan support, with legislators quickly lining up to enhance the voting experience of those who are putting their lives at risk to protect American security.<sup>1</sup> These service personnel may be in a tent in Afghanistan on Election Day or spending the entire election season at sea on a nuclear submarine. They may even be stationed at their home precinct on a military base in the United States but be subject to a potential deployment somewhere else, with little notice, in the days before an election and therefore wish to vote by absentee ballot in advance.

Although no single accommodation best suits each of these circumstances, a combination of measures now in place has enhanced the voting opportunities for all military voters as well as for overseas civilians.<sup>2</sup> Meanwhile, some similar accommodations

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1. See, e.g., John Cornyn, U.S. Sen., An Author's Assessment of the Effectiveness of the MOVE Act, in HERITAGE LECTURES, Aug. 12, 2011, at 2 (describing a "bipartisan group of Senators" responsible for MOVE Act).

2. An army private in a tent in Afghanistan might be best assisted through the electronic transmission of a blank ballot forty-five days before Election Day, as required by federal law, see *infra* notes 79–80 and accompanying text, which the private could vote in

also could enhance the voting experience of other voters in a number of ways, including possibly alleviating long lines like those that, as recently as the 2012 presidential election, continued to plague some voters at the polls on Election Day.<sup>3</sup> In fact, the Obama campaign successfully sued Ohio in 2012 to make early voting opportunities for military voters available to all voters.<sup>4</sup> Yet not all of the accommodations for the specialized circumstances of military and overseas voters will translate well to other contexts.

Military and overseas voters have come to be known as “UOCAVA voters” because of the federal law—the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”)<sup>5</sup>—that since 1986 has provided these voters with several key accommodations for voting in federal elections. The desire to assist these UOCAVA voters understandably is widespread, although it is not always easy to agree upon the best ways to maximize their ability to participate. Moreover, the extent to which these accommodations actually do help “get out the vote” is not yet clear, as witnessed by concerns this year about low voting participation rates among UOCAVA voters.<sup>6</sup> Nevertheless, the desire to assist these voters is strong. Moreover, the evolution of the voting processes used for UOCAVA voters also has both direct and indirect implications for efforts to improve the voting experience of other voters.

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the tent without the need for a contemporaneous postmark, as the Uniform Law Commission’s (“ULC’s”) proposed uniform state law would allow, see *infra* note 85 and accompanying text. A navy ensign on a long-term submarine deployment might be better served by voting a federal write-in absentee ballot, see *infra* note 62 and accompanying text, long before regular absentee ballots would be available. A service member subject to an abrupt deployment right before Election Day might be assisted by the final weekend of early in-person voting that Ohio made available to military personnel in 2012. See *infra* notes 192–200 and accompanying text. But this voter would derive even more meaningful assistance from the provision in the ULC’s proposed uniform state law that permits all military personnel, not just those who are absent from their home precinct, to use the military and overseas voting process as their default, precisely to avoid the voting difficulties that can arise in the case of a last-minute deployment. See *infra* note 202.

3. See, e.g., Brad Plumer, “We Have to Fix That,” but Will We?, WASH. POST, Nov. 9, 2012, at A26 (quoting President Obama’s 2012 victory speech).

4. Obama for Am. v. Husted, 697 F.3d 423, 425 (6th Cir. 2012).

5. 42 U.S.C. §§ 1973ff to 1973ff-6 (2006 & Supp. IV 2011).

6. See, e.g., MILITARY VOTER PROT. PROJECT, MILITARY VOTING UPDATE: A BLEAK PICTURE IN 2012, at 1, 4 (2012); *Military Ballot Requests Down in Key Battleground States*, FOXNEWS (Oct. 1, 2012), <http://www.foxnews.com/politics/2012/10/01/military-ballot-requests-down-in-key-battleground-states/>.

Section II offers a brief overview of the history and status of efforts to enable military personnel to vote, including the development of UOCAVA and its recent amendment with the 2009 federal Military and Overseas Voter Empowerment (“MOVE”) Act.<sup>7</sup> But long before these federal statutes, individual states had adopted various accommodations for military voters, which helped to pave the way for other absentee voter measures. Since 2010, the Uniform Law Commission’s (“ULC”) state-level Uniform Military and Overseas Voters Act (“UMOVA”)<sup>8</sup> also has offered an approach that helps states to comply with federal law, while also extending comparable protections to all state elections and to a wider class of military and overseas voters, and while enhancing nationwide uniformity in the processes by which military and overseas voters participate in elections.

Section III uses three recent “controversies” in UOCAVA voting to explore how these voting accommodations can work in practice, and to highlight their connections to the larger field of election administration. The first controversy concerns the impact of military and overseas voting on the outcome of the 2000 presidential election in Florida.<sup>9</sup> The second involves Virginia’s difficulties transmitting and processing UOCAVA ballots in 2008, which led to litigation and a federal consent decree concerning the state’s compliance with the requirements of the UOCAVA statute.<sup>10</sup> The third is the Obama campaign’s 2012 federal suit over Ohio’s early voting rules that provided UOCAVA voters with three additional days of early in-person voting not available to non-UOCAVA voters, a lawsuit that generated complaints from many military and veterans groups that the Obama campaign was seeking to deprive UOCAVA voters of their protections.<sup>11</sup>

Drawing upon these three recent controversies over accommodations for military and overseas voters, Section IV then concludes with some broader reflections about early and absentee

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7. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 575–89, 123 Stat. 2190, 2318–35 (2009).

8. See *Military and Overseas Voters Act*, UNIFORM LAW COMMISSION, [http://www.uniformlaws.org/Act.aspx?title=Military and Overseas Voters Act](http://www.uniformlaws.org/Act.aspx?title=Military+and+Overseas+Voters+Act) (last visited Feb. 18, 2013). The ULC is formally titled the National Conference of Commissioners on Uniform State Laws. See *About the ULC*, UNIFORM LAW COMMISSION, [http://uniformlaws.org/Narrative.aspx?title=About the ULC](http://uniformlaws.org/Narrative.aspx?title>About+the+ULC) (last visited Feb. 18, 2013).

9. See *infra* notes 92–128 and accompanying text.

10. See *infra* notes 129–58 and accompanying text.

11. See *infra* notes 159–220 and accompanying text.

voting generally. Although this section remains cautious about the desirability of extensive “convenience” voting in the form of absentee voting open to all voters, it offers some proposed best approaches for implementing both absentee and early voting. It also encourages states that have not done so to consider adopting UMOVA, in order to promote greater uniformity in UOCAVA voting in all U.S. elections.

At the outset, I want to note two aspects of the perspective from which I write. First, I come to these issues with the experience of having served as the reporter for the ULC drafting committee that, between 2008 and 2010, developed UMOVA. The commission, which had not previously tackled an election law topic, took up a project focused only on military and overseas voting in 2008 in part because it saw the project as unlikely to generate strong partisan conflicts. Understanding the points of agreement that emerged from this uniform law project for military and overseas voters also will help explain more about the changing landscape of absentee and early voting generally. Meanwhile, in 2011 the American Law Institute also commenced an election law project, focused on the two relatively less partisan topics of post-election dispute resolution and nontraditional voting processes. I have the pleasure of serving as the associate reporter on this project, along with the principal reporter, my Ohio State University Moritz College of Law colleague Ned Foley. Of course, the opinions and conclusions in this article are entirely my own and not those of the ULC, the American Law Institute, or Professor Foley.

## II. THE EVOLUTION OF UOCAVA VOTING

Although absentee voting may seem to be a fundamental part of modern elections, it has not always been available. The rise of absentee voting for the American public is related to the evolution of absentee voting for military service members, beginning with the Civil War and renewed by World War I. Additional efforts to enfranchise military and overseas voters occurred during World War II and the Korean War, though UOCAVA itself was not enacted until 1986.<sup>12</sup> Today, improvements developed initially for military voters continue to influence methods of convenience vot-

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12. Pub. L. No. 99-410, 100 Stat. 924 (1986).

ing generally.

### A. *From the Civil War through World War I*

Although limited absentee voting apparently was occurring in New England in the seventeenth century,<sup>13</sup> the Civil War brought the first widespread use of absentee voting. The 1864 presidential election was the first national election any nation had ever conducted in the middle of a civil war,<sup>14</sup> and more than 10% of the voting population was serving in the armed services during the conflict.<sup>15</sup> Moreover, Republicans were interested in capturing as many votes as possible from Union troops, who overwhelmingly favored President Lincoln's re-election bid.<sup>16</sup> Immediately prior to the Civil War, only one state—Pennsylvania—had provisions that permitted absent servicemen to vote,<sup>17</sup> but by 1864 nineteen of twenty-five Union states, and seven of eleven Confederate states, had implemented some means of allowing their soldiers to vote away from their home polling place.<sup>18</sup> The move to permit absentee military voting was not uncontroversial, however, creating a partisan divide in some places<sup>19</sup> and, in other places, necessitating that states first amend provisions in their state constitutions that, essentially as an anti-fraud measure, required voting to occur in-person.<sup>20</sup>

Notwithstanding the concerns about fraud, two principal me-

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13. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 121 (2009 ed., 2000).

14. See Donna Miles, *Servicemembers to Follow Long Absentee Voting Tradition*, U.S. DEP'T OF DEF. (Sept. 16, 2008), <http://www.defense.gov/News/NewsArticle.aspx?ID=51200>; R. Michael Alvarez, Thad E. Hall & Brian F. Roberts, *Military Voting and the Law: Procedural and Technological Solutions to The Ballot Transit Problem* 11 (Voting Tech. Project, Working Paper No. 53, 2007), available at [http://www.vote.caltech.edu/sites/default/files/vtp\\_wp53.pdf](http://www.vote.caltech.edu/sites/default/files/vtp_wp53.pdf).

15. See Alvarez, Hall & Roberts, *supra* note 14.

16. See JOHN C. FORTIER, *ABSENTEE & EARLY VOTING: TRENDS, PROMISES, AND PERILS* 7–8 (2006); John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 494 (2003).

17. See Fortier & Ornstein, *supra* note 16, at 497; see generally Jonathan W. White, *Canvassing the Troops: The Federal Government and the Soldiers' Right to Vote*, 50 CIV. WAR HIST. 291, 291 (2004).

18. See Fortier & Ornstein, *supra* note 16, at 493 (citing JOSIAM HENRY BENTON, *VOTING IN THE FIELD: A FORGOTTEN CHAPTER OF THE CIVIL WAR* 312–15 (priv. print 1915)).

19. See Donald S. Inbody, *Political Barriers to Military Voting: A Brief Historical Overview*, OVERSEAS VOTE FOUND'N RES. NEWSL., May–June 2010, at 1.

20. See Fortier & Ornstein, *supra* note 16, at 494–500.

thods of absentee voting were deployed for Civil War soldiers. One involved creating battlefield polling locations, an option made easier by the organization of the Union army into state regiments.<sup>21</sup> Under this method, soldiers in the field would cast their ballot into a ballot box under the eyes of supervising officers, and when voting was finished, the box would be secured and transported back to the home state, where its contents would be counted.<sup>22</sup> The second method involved allowing soldiers to designate a proxy, who could vote on the soldier's behalf in the soldier's home jurisdiction.<sup>23</sup> Both methods were vulnerable to fraud, however, whether because the proxy misrepresented the soldier's preferences or otherwise abused the soldier's trust or because the soldier was coerced by military authority to vote in a particular way.<sup>24</sup> In addition, in at least one New York case, election officials were charged with forging soldiers' names on ballots.<sup>25</sup>

At the time of the Civil War, the "Australian" or secret ballot was not yet in use in the United States.<sup>26</sup> As a result, even regular voting was also easily vulnerable to fraud and coercion.<sup>27</sup> In the decades after the Civil War, most states turned their attention towards adopting the Australian ballot, while absentee voting received comparably little attention.<sup>28</sup> A few states adopted new absentee voting laws for military during the Spanish-American war, but in many other places military voting rights lapsed until World War I.<sup>29</sup> Even then, little was done to accommodate military voters who were overseas, for whom the round-trip transit time for absentee ballots essentially made voting impossible within the period of the typical absentee voting window, which was usually thirty days or less.<sup>30</sup>

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21. *See id.* at 492.

22. *See id.* at 500 (citing BENTON, *supra* note 18, at 15, 54).

23. *See id.*

24. *See id.* at 494–95.

25. *See id.* at 496 (citing BENTON, *supra* note 18, at 160).

26. *See* KEYSSAR, *supra* note 13, at 115.

27. *See* Fortier & Ornstein, *supra* note 16, at 489–90.

28. *See id.* at 490–91, 501.

29. *See* FORTIER, *supra* note 16, at 8; Fortier & Ornstein, *supra* note 16, at 504–05 (citing Paul G. Steinbicker, *Absentee Voting in the United States*, 32 AM. POL. SCI. REV. 898, 898–99 (1938)).

30. *See* Alvarez, Hall & Roberts, *supra* note 14, at 16 (explaining that Congress considered but failed to adopt legislation that would have offered some assistance to overseas military personnel during World War I).

Notably, the widespread adoption of the (secret) Australian ballot was in tension with the generous use of the (not-secret) absentee ballot.<sup>31</sup> Nevertheless, in the early twentieth century many states began expanding absentee voting to non-military voters; by World War II most states also permitted some amount of civilian absentee voting.<sup>32</sup> Having recognized the value of allowing absent soldiers to participate in elections, it was a natural move for states to allow others who were excusably absent from their voting jurisdiction on Election Day to do the same. Indeed, one early twentieth century reformer opined that the Industrial Revolution had produced an economic system that, much like military conscription, removed voters, “through no fault of their own, . . . from their places in the body politic and deprived [them] of their rightful votes.”<sup>33</sup> However, in order to provide some protection against absentee ballot fraud, typical state statutes permitted absentee balloting only for the limited class of voters unable to reach the polls on Election Day and required that an absentee voter cast the ballot in the presence of a notary who could validate the voter’s affirmation that the vote was not coerced.<sup>34</sup> Still, an increasingly transient society was increasingly interested in alternatives to in-precinct Election Day voting for both military and civilian voters who were away from home.

#### B. *From World War II Through the Vietnam Era*

World War II witnessed substantial additional attention to the voting difficulties facing American military personnel, especially those stationed overseas. In the early months of the war, Congress took up legislation that would become the Soldier Voting Act of 1942,<sup>35</sup> the first federal guarantee of a right to vote for American military, which applied only to federal elections and only during wartime.<sup>36</sup> It excused military members from any state

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31. See FORTIER, *supra* note 16, at 8–11.

32. See *id.* at 10–11; Fortier & Ornstein, *supra* note 16, at 504.

33. KEYSSAR, *supra* note 13, at 122 (internal quotation marks omitted) (quoting 3 DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION 1917–1918, at 12 (1920) (statement of Chmn. Knotts)).

34. See FORTIER, *supra* note 16, at 10–11; Fortier & Ornstein, *supra* note 16, at 502–06.

35. Pub. L. No. 77-712, 56 Stat. 753.

36. See KEVIN J. COLEMAN, CONGRESSIONAL RESEARCH SERV., THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT: OVERVIEW AND ISSUES 1 (2012).

poll taxes, allowed them to vote even if they were not previously registered, and permitted them to request an “official war ballot” from their home state, using a postcard distributed to them by the Department of War.<sup>37</sup> The federal government then offered to reimburse states for the costs associated with providing war ballots to military voters.<sup>38</sup> The measure was enacted too late to have more than a modest impact on the 1942 midterm congressional elections, but a revised measure enacted in anticipation of the 1944 presidential election is credited with allowing close to three million military personnel to vote.<sup>39</sup>

However, the 1944 law was in some ways weaker than the 1942 law, reflecting the fact that partisan considerations were affecting even the effort to assist military voters. For instance, unlike its predecessor, the 1944 version replaced most of the mandatory provisions of the 1942 act with “recommendations” that states facilitate military voting.<sup>40</sup> Northern Democrats had supported a provision that would have created for the first time a “federal war ballot,” prepared and distributed by the federal government, that military voters could use if the state’s own absentee ballot did not reach the voter in time.<sup>41</sup> But Republicans and Southern Democrats would only support a weaker measure, which gave each state the power to decide whether to accept the federal war ballot.<sup>42</sup> Perhaps spurred in part by the congressional activity, many states also amended their own absentee voting laws to further facilitate military voting, at least during wartime, consistent with their own election processes.<sup>43</sup>

After the war ended, if anything, the voting opportunities of the American military initially grew more restricted as some states imposed additional hurdles.<sup>44</sup> In 1952, during the Korean War, President Truman therefore urged Congress to do more to help military voters, specifically pressing for passage of a tempo-

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37. See *id.*; Alvarez, Hall & Roberts, *supra* note 14, at 18; see generally KEYSSAR, *supra* note 13, at 197.

38. See Alvarez, Hall & Roberts, *supra* note 14, at 18 (quoting Pub. L. No. 77-712, § 10(a), 56 Stat. at 756).

39. See *id.* at 19–21.

40. See COLEMAN, *supra* note 36, at 1. Compare 56 Stat. at 753, with Act of April 1, 1944, Pub. L. No. 78-277, 58 Stat. 136.

41. See Alvarez, Hall & Roberts, *supra* note 14, at 19–20.

42. See *id.* at 20.

43. See FORTIER, *supra* note 16, at 11.

44. See Alvarez, Hall & Roberts, *supra* note 14, at 22.



rary federal law for the presidential election that year, which would then be followed by permanent state laws in time for the 1954 congressional midterms.<sup>45</sup> Congress did not act until three years later, however, when it adopted the Federal Voting Assistance Act of 1955.<sup>46</sup> This measure *recommended*, but did not require, that states permit absentee voter registration for military personnel in addition to absentee voting; that these opportunities be available not only to absent active duty military but also to civilian employees of the federal government abroad and to other civilian citizens involved in the military effort; and that they apply whether or not the country was formally at war.<sup>47</sup>

By the early 1960s, those few remaining states that had not previously adopted some form of *civilian* absentee voting did so.<sup>48</sup> Meanwhile, the near universal suffrage theoretically guaranteed by the passage of the Voting Rights Act of 1965 helped ease partisan battles over congressional efforts to assist military voters.<sup>49</sup> In 1968, Congress amended the Voting Assistance Act to extend its recommended accommodations to cover all U.S. citizens living abroad.<sup>50</sup> Many such citizens, however, could not meet state residency requirements that were prerequisites for absentee voting in a particular state.<sup>51</sup> Seven years later, Congress passed the Overseas Citizens Voting Rights Act of 1975, which gave U.S. citizens living abroad the right to vote by absentee ballot in federal elections, even if they no longer met state residency requirements, by allowing them to treat their last U.S. domicile before departing the country as their voting jurisdiction.<sup>52</sup> Accompanying these expansions, the major political parties began courting overseas and military voters more systematically, and the military appointed voting assistance officers all around the globe to help deployed troops vote.<sup>53</sup>

Yet as the Vietnam era ended, the processes by which overseas

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45. See Letter from Harry S. Truman, President, to Congress (Mar. 28, 1952), *in* VOTING IN THE ARMED FORCES, H.R. DOC. No. 82-407, at iii–iv (1952).

46. Pub. L. No. 84-296, 69 Stat. 584.

47. See COLEMAN, *supra* note 36, at 1.

48. See FORTIER, *supra* note 16, at 12.

49. See ALVAREZ, Hall & Roberts, *supra* note 14, at 26.

50. See COLEMAN, *supra* note 36, at 1.

51. See U.S. COMM'N ON CIV. RIGHTS, THE VOTING RIGHTS ACT: SUMMARY AND TEXT 6 (1971).

52. See COLEMAN, *supra* note 36, at 1.

53. See Alvarez, Hall & Roberts, *supra* note 14, at 25.

and military voters could exercise these rights remained problematic for many of them.<sup>54</sup> One commonly cited problem involved the mail service, with many ballots either arriving too late or not at all.<sup>55</sup> Another timing problem resulted from the fact that many states normally did not print their ballots until shortly before the election.<sup>56</sup>

### C. UOCAVA of 1986

In 1986, building on the Overseas Voting Rights Act of 1975 and the Federal Voting Assistance Act of 1955, Congress enacted UOCAVA.<sup>57</sup> In part, the measure was intended to consolidate existing protections for military and overseas voters and eliminate obsolete and conflicting provisions.<sup>58</sup> More importantly, it was intended to provide these voters with additional assistance.<sup>59</sup>

Specifically, UOCAVA ensured that active duty members of the U.S. military and their dependents who were absent from their voting jurisdiction because of military service, and U.S. citizens living abroad, had the right to vote by absentee ballot in federal elections in their home state or the state in which they were last domiciled before going abroad.<sup>60</sup> Building on its predecessors, UOCAVA urged states to accept a federal post card application, which UOCAVA voters were allowed to use both to register to vote in their home state and simultaneously to request an absentee ballot.<sup>61</sup> UOCAVA also established a new federal ballot, called the federal write-in absentee ballot, to be used as an emergency back-up in the event that voters covered by UOCAVA had applied for, but not received, their state's regular military ballot.<sup>62</sup> UOCAVA also tasked a "Presidential Designee" with certain ad-

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54. *See id.* at 28.

55. *E.g.*, 132 CONG. REC. S7190 (daily ed. June 10, 1986) (statement of Sen. John Warner).

56. *Uniformed and Overseas Citizens Absentee Voting: Hearing on H.R. 4393 Held Before the Subcomm. on Elections*, 99th Cong. 12 (1986) (statement of Rep. Allan Swift, Chairman, H. Subcomm. on Elections).

57. Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986).

58. *See* H.R. REP. NO. 765, at 1, 5, 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2009, 2011.

59. *See id.* at 5, 7.

60. §§ 102, 107, 100 Stat. at 925, 927-28.

61. *Id.* §§ 101, 104, 100 Stat. at 924, 926.

62. *Id.* § 103, 100 Stat. at 925-26.

ministrative responsibilities.<sup>63</sup> President Reagan designated the Secretary of Defense as the Presidential Designee, and most of the duties were assigned to the Federal Voting Assistance Program (“FVAP”) within the Department of Defense.<sup>64</sup>

But some two decades after its enactment, UOCAVA still had not solved the most critical problem facing overseas voters: the need for more time to request, receive, vote, and return an absentee ballot before the state deadlines.<sup>65</sup> UOCAVA imposed no specific timeframe for transmitting ballots, and state practices varied widely.<sup>66</sup> In addition, in election after election, many UOCAVA voters never even received balloting materials because of bad addresses, frequent relocations, and other mail delivery problems.<sup>67</sup> Even those voters who did receive a ballot in time to cast and return it before the state deadline might sometimes encounter difficulties in finding an official to notarize the ballot, or otherwise in executing it.<sup>68</sup>

As a result, one estimate of voting participation rates in 2008 concluded that only about 30% of eligible military voters had cast a valid ballot, compared to an overall nationwide turnout rate that year of over 60%.<sup>69</sup> These figures were an improvement over figures from 2006 (a year not directly comparable to 2008 because it was not a presidential election year), when military voter turnout was estimated at about 20%, again roughly half of the 40% overall nationwide turnout that year.<sup>70</sup> Although one recent study that controlled for the demographic facts that the military population tends to be younger and more male than the overall voting

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63. *Id.* § 101, 100 Stat. at 924.

64. Exec. Order No. 12,642, 53 Fed. Reg. 21,975 (June 8, 1988).

65. See OVERSEAS VOTE FOUND’N, 2008 OVF POST ELECTION UOCAVA SURVEY REPORT & ANALYSIS 15–22 (2009); PEW CTR. ON THE STATES, NO TIME TO VOTE: CHALLENGES FACING AMERICA’S OVERSEAS MILITARY VOTERS 1–5 (2009) [hereinafter NO TIME TO VOTE].

66. See NO TIME TO VOTE, *supra* note 65, at 1.

67. See ADAM SKAGGS, BRENNAN CTR. FOR JUSTICE, REGISTERING MILITARY AND OVERSEAS CITIZENS TO VOTE 6–7 (2009).

68. See, e.g., PEW CTR. ON THE STATES, MAKING THE ELECTION SYSTEM WORK FOR MILITARY AND OVERSEAS VOTERS 3 (2009) [hereinafter MAKING THE ELECTION SYSTEM WORK].

69. Compare ERIC EVERSOLE, MILITARY VOTER PROTECTION PROJECT, MILITARY VOTING IN 2010: A STEP FORWARD, BUT A LONG WAY TO GO 2 & n.7 (2012), with 2008 General Election Turnout Rates, GEORGE MASON UNIV. (Mar. 31, 2012), [http://elections.gmu.edu/Turnout\\_2008G.html](http://elections.gmu.edu/Turnout_2008G.html).

70. See SKAGGS, *supra* note 67, at 1–2; PEW CTR. ON THE STATES, MILITARY AND OVERSEAS CITIZEN VOTING PROJECT 1 (2008).

age population found much less disparity between military turnout and overall turnout, military turnout was still lower despite a higher voter registration rate among the military population.<sup>71</sup>

D. *Recent State and Federal Legislation: UMOVA and MOVE*

In 2008, encouraged by the Pew Center on the States, as well as the Alliance for Military and Overseas Voting Rights, the Overseas Vote Foundation, the FVAP, and other military and voter advocacy groups, the ULC undertook a project to develop a uniform state law that would standardize and improve the voting options available to military and overseas voters.<sup>72</sup> One reflection of the pressing need for increased standardization was the fact that FVAP's *Voting Assistance Guide*, relied on by military voting assistance officers throughout the world, had grown to over 400 pages in length.<sup>73</sup> After a two-year drafting process, the result of this ULC effort was UMOVA.<sup>74</sup> In the first two years since UMOVA's promulgation, ten states (including three states with large military populations, California, Virginia, and North Carolina) and the District of Columbia have enacted some version of UMOVA.<sup>75</sup>

For the first year of the UMOVA drafting process, it seemed likely that the act's most important contributions would be (1) its specification of a substantial time period well before an election by which time an adopting state must have transmitted an absentee ballot to a voter covered by the Act and (2) a requirement that the state transmit this ballot to the voter electronically, if requested by the voter.<sup>76</sup> The drafters also considered a variety of

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71. FED. VOTING ASSISTANCE PROGRAM, 2010 POST ELECTION SURVEY REPORT TO CONGRESS ii, 11–14 (2011).

72. Press Release, Uniform Law Commission, New Act Designed to Help Military and Overseas Voters (July 30, 2010), *available at* [http://www.uniformlaws.org/Shared/Docs/UMOVA Press Release 7-30-10.doc](http://www.uniformlaws.org/Shared/Docs/UMOVA%20Press%20Release%207-30-10.doc).

73. See FED. VOTING ASSISTANCE PROGRAM, *supra* note 71, at 42.

74. See Steven F. Huefner, Commentary, *Protecting the Voting Rights of Military and Overseas Voters*, ELECTION LAW & MORITZ (Sept. 21, 2010), *available at* [http://www.uniformlaws.org/Shared/Docs/Huefner Article Moritz 9-21-10.pdf](http://www.uniformlaws.org/Shared/Docs/Huefner%20Article%20Moritz%209-21-10.pdf).

75. Adopting States have not always adopted all of UMOVA's provisions. See *Military and Overseas Voters Act*, *supra* note 8. Compare UNIF. MILITARY & OVERSEAS VOTERS ACT § 13, 13 U.L.A. 88 (Supp. 2012), with Act of Mar. 25, 2011, ch. 327, 2011 Utah Laws 1830.

76. UNIF. MILITARY & OVERSEAS VOTERS ACT, § 9(a), (b), 13 U.L.A. 86 (Supp. 2012). In the early stages of the drafting process, the drafting committee also considered including a provision in UMOVA permitting electronic transmission of a *voted* ballot but ultimately concluded that security concerns, whether real or perceived, made electronic voting too

possible definitions of the class of covered voters, ultimately deciding to broaden the coverage beyond that offered by UOCAVA to include active-duty military personnel who were not absent from their voting residence and also to include the relatively small number of U.S. citizens born abroad who have never had a direct tie to any of the fifty states.<sup>77</sup> Of course, as a state law, UMOVA also was able to extend its coverage to all state elections—another way in which it provided a broader scope of coverage than that provided by UOCAVA, which by its terms applied to elections for federal office.<sup>78</sup>

The potential impact of UMOVA changed midstream, however, when Congress in 2009 took up its own measure to improve the voting opportunities of UOCAVA voters. This measure, the MOVE Act, amended UOCAVA to impose for the first time in federal law a specific deadline, forty-five days before Election Day, by which time states were required to transmit absentee ballots to UOCAVA voters and establish the ability to send these ballots to voters electronically,<sup>79</sup> much as the developing UMOVA was being drafted to require.<sup>80</sup> The federal MOVE Act also prohibited states from imposing a notarization requirement on UOCAVA ballots.<sup>81</sup> The measure allowed states to seek a waiver of the forty-

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controversial to include in this uniform state law. Nevertheless, more than half the states have begun implementing pilot projects or limited electronic ballot casting methods for their UOCAVA voters. See Ian Urbina, *States Move to Allow Overseas and Military Voters to Cast Ballots by Internet*, N.Y. TIMES, May 9, 2010, at A18.

77. UNIF. MILITARY & OVERSEAS VOTERS ACT, § 2(1)(E) & cmt., 13 U.L.A. 79–81 (Supp. 2012).

78. *Id.* § 3 & cmt., 13 U.L.A. 81 (Supp. 2012). If only for administrative convenience, many states already extended UOCAVA's protections to all state elections held in conjunction with a federal election. See, e.g., COLO. REV. STAT. § 1-8.3-103 (2011); CARRIE KURUC, OFFICE OF OHIO SEC'Y OF STATE, UOCAVA VOTING (2012); COLO. DEP'T OF STATE, COLORADO DEPARTMENT OF STATE: QUICK REFERENCE GUIDE (July 29, 2011); Terrance Adams, *OLR Research Report: Electronic Ballot Submission By Military and Overseas Voters*, CONN. GEN. ASSEMBLY OFFICE OF LEGISLATIVE RESEARCH (Jan. 8, 2013), <http://www.cga.ct.gov/2013/rpt/2013-R-0022.htm>; *Voting for Military and Overseas U.S. Citizens*, OFFICE OF SEC'Y OF COMMONWEALTH OF MASS., <http://www.sec.state.ma.us/ELE/elemil/milidx.htm> (last visited Feb. 18, 2013). But this extension was not legally required, see *The Uniformed and Overseas Citizens Absentee Voting Act*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/crt/about/vot/misc/activ\\_uoc.php](http://www.justice.gov/crt/about/vot/misc/activ_uoc.php) (last visited Feb. 18, 2013), and many states with state and local elections held independently of federal elections offered no accommodations for UOCAVA voters. See, e.g., *Fischer v. Stout*, 741 F.2d 217, 222 (Alaska 1987).

79. Pub. L. No. 111-84, §§ 578–79, 123 Stat. 2190, 2321–22 (2009) (codified as amended at 42 U.S.C. § 1973ff -1(a)(7), (8) (2006 & Supp. V 2012)).

80. UNIF. MILITARY & OVERSEAS VOTERS ACT, § 9, 13 U.L.A. 86 (Supp. 2012).

81. § 582(a)(i)(1), 123 Stat. at 2327 (codified as amended at 42 U.S.C. § 1973ff-1(i)(1)).

five-day transmission deadline, on an election-by-election basis, if a state could demonstrate a hardship and had an acceptable alternative for protecting the voting opportunities of its UOCAVA voters.<sup>82</sup> But the MOVE Act, as a new federal requirement, forced states' hands (at least for federal elections) in a way that the UMOVA, as a ULC proposal that each state was free to adopt or ignore, could not have. Some states even had to move their primary election earlier in the fall in order to be able to prepare general election absentee ballots in time to meet the MOVE Act's forty-five-day ballot transmission deadline.<sup>83</sup>

After the MOVE Act's adoption, UMOVA then became most important for its broadened scope—in terms of both its coverage of state elections and its coverage of a wider category of covered voters<sup>84</sup>—and for its adoption of various other more modest accommodations. These included letting covered voters submit an absentee ballot without either a postmark or a witness, as long as the voter affirmed the ballot's validity and timeliness under penalty of perjury;<sup>85</sup> letting these ballots be received after Election Day, up through the day before the relevant jurisdiction's local canvass deadline, as long as the voter affirmed under penalty of perjury that the ballot had been cast before 12:01 a.m. on Election Day;<sup>86</sup> and giving covered voters a private right of action to seek equitable relief for violations of its provisions.<sup>87</sup>

Because the ULC promulgated the final version of UMOVA on September 30, 2010, no state was able to adopt it before the November 2010 federal midterm elections.<sup>88</sup> However, the 2010 elections were subject to the federal MOVE Act's forty-five-day ballot transmission requirement.<sup>89</sup> Eleven states, two territories, and

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82. *Id.* § 579(a), 123 Stat. at 2322–23 (codified as amended at 42 U.S.C. § 1973ff-1(g)(1), (2)).

83. *See, e.g.*, Tim Craig, *Questions on Minds of Voters: Already?*, WASH. POST, Mar. 13, 2012, at B01; Thomas Kaplan, *June Primary Date in Congress Races*, N.Y. TIMES, Jan. 28, 2012, at A24.

84. *See supra* notes 77–78 and accompanying text.

85. UNIF. MILITARY & OVERSEAS VOTERS ACT, §§ 12(b), 13, 13 U.L.A. 87 (Supp. 2012).

86. *Id.* §§ 10, 12(a), 13 U.L.A. 86–87 (Supp. 2012).

87. *Id.* § 18, 13 U.L.A. 90 (Supp. 2012).

88. Utah became the first state to adopt UMOVA in March 2011. *See* Act of Mar. 25, 2011, ch. 327, 2011 Utah Laws 1812; Press Release, Uniform Law Commission, Utah First State to Enact Important New Law Designed to Help Military and Overseas Voters (Mar. 28, 2011), available at [www.uniformlaws.org/NewsDetail.aspx?title=Utah First State to Enact Uniform Military and Overseas Voters Act](http://www.uniformlaws.org/NewsDetail.aspx?title=Utah%20First%20State%20to%20Enact%20Uniform%20Military%20and%20Overseas%20Voters%20Act).

89. *See supra* note 79 and accompanying text.

the District of Columbia were not able to meet this requirement that year,<sup>90</sup> but even with thirty-six states meeting the requirement, one 2010 study reported that only 4.6% of America's two million military voters cast a counted ballot in 2010 (from among the 15.8% of these voters who requested a ballot that year).<sup>91</sup> Two significant concerns therefore remained for future elections: that a sizable portion of potential UOCAVA voters do not even manage to apply for a ballot and that a substantial portion of those who do are nevertheless not able to successfully complete and return it in time.

In a close election, these missing votes certainly have the potential to make a difference. Indeed, as Section III discusses, controversies in three of the last four presidential elections confirm the importance of the effort to "Get Out the Vote" with respect to military and overseas citizens. Section IV will then consider ways to continue to improve the voting processes, both for UOCAVA voters and for other absentee and early voters.

### III. RECENT CONTROVERSIES IN UOCAVA VOTING: THREE TALES FROM PRESIDENTIAL SWING STATES

It will help to understand the impact of current state and federal accommodations for military and overseas voters to consider them not only in terms of what the key features of these accommodations require on paper, but also in terms of how these provisions have shaped campaign outcomes and strategy on the ground in recent elections. Though it is now largely a forgotten memory, the outcome of the 2000 presidential election in Florida in fact was determined by Florida's acceptance of late-arriving UOCAVA ballots. Given this fact, in 2008 it therefore was understandable for the McCain campaign to believe that UOCAVA voting could again be outcome determinative, at least in swing states with large military populations like Virginia. The campaign's identification of problems with Virginia's UOCAVA balloting accordingly led the campaign to sue the Commonwealth the day before Election Day to protect the votes of military voters.

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90. U.S. DEP'T OF JUST., UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT, ANNUAL REPORT TO CONGRESS 1 (2010).

91. EVERSELE, *supra* note 69, at 4–5. Comparable figures for 2006 were 5.5% and 16.5%. *Id.* As of the drafting this article, data about UOCAVA voter participation in the November 2012 election were not yet available.

Most recently, in 2012 the Obama campaign used to broader advantage a seemingly accidental feature of a convoluted Ohio scheme that permitted only UOCAVA voters to use early in-person voting on the three days immediately before Election Day. The campaign successfully argued in federal court that all Ohio voters should be able to take advantage of these opportunities. Each of these three recent UOCAVA election controversies not only clarifies UOCAVA voting practices but also sheds light on early and absentee voting processes generally.

#### A. *Florida 2000*

It is a relatively under studied<sup>92</sup> and not frequently acknowledged<sup>93</sup> fact of the 2000 presidential election that overseas ballots arriving after Election Day were necessary for George W. Bush's ultimate 537-vote margin of victory in Florida. Unofficial Election Night returns showed Bush to be ahead in Florida by almost 1800 votes over Al Gore, his Democratic opponent.<sup>94</sup> But official results, after local canvassing and partial recounts, showed that out of all the valid Florida ballots cast and received by the end of Election Day, Gore actually received 202 more votes than Bush.<sup>95</sup> Why then did Bush win Florida's twenty-five presidential electors? Because the state's final official count also included almost 2500 additional votes that arrived from overseas after Election Day, 1575 of which were for Bush and 836 of which were for Gore.<sup>96</sup> Bush thus had a net advantage of 739 votes from these late-arriving overseas ballots, more than enough to offset his 202-vote deficit in

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92. The best accounts are Kosuke Imai & Gary King, *Did Illegal Overseas Absentee Ballots Decide the 2000 U.S. Presidential Election?*, 2 PERSP. ON POL. 537 (2004); Diane H. Mazur, *The Bullying of America: A Cautionary Tale about Military Voting and Civil-Military Relations*, 4 ELECTION L.J. 105 (2005); David Barstow & Don van Natta, Jr., *Examining the Vote; How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES, July 15, 2001, at A1.

93. Cf. Mazur, *supra* note 92, at 105 ("[N]o legal writer has ever made more than a passing reference to the issues of military voting that dominated the 2000 election crisis for weeks.").

94. Barstow & van Natta, *supra* note 92.

95. Imai & King, *supra* note 92, at 537. The official totals of Florida votes cast by the close of the polls were 2,911,417 votes for Gore to 2,911,215 votes for Bush. *Id.* at 538; see Barstow & van Natta, *supra* note 92.

96. Imai & King, *supra* note 92, at 538. A total of 3704 overseas ballots arrived after Election Day, see Mazur, *supra* note 92, at 105, only 2490 of which (about two-thirds) were counted, see Barstow & van Natta, *supra* note 92.



the official count of those votes cast by the close of the polls on Election Day.<sup>97</sup>

Florida counted these late-arriving overseas ballots because of a consent decree resulting from a 1982 federal lawsuit brought against Florida by the U.S. Department of Justice, alleging that Florida's late primary election date left insufficient time for military voters and overseas civilians to exercise their voting rights as then protected by the Federal Voting Assistance Act and the Overseas Citizens Voting Rights Act.<sup>98</sup> Florida, of course, has a substantial number of military voters, given the presence of major Air Force and Navy bases in the state.<sup>99</sup> The lawsuit was settled with an agreement that, in the 1982 midterm elections, Florida would accept ballots from these voters until ten days after Election Day, provided that the ballots were postmarked by Election Day and provided that thereafter Florida, presumably through its legislature, would develop a permanent response for subsequent federal elections.<sup>100</sup> When the legislature would not move the state's primary elections, in 1984 the Florida secretary of state asked the court instead to approve an administrative rule that permanently continued the ten-day post-election window for the receipt of all overseas absentee ballots, provided the ballots bore *either* a postmark or the voter's signature dated on or before Election Day.<sup>101</sup>

In 2000, Florida somewhat curiously was continuing its practice of accepting late-arriving overseas ballots, even though in 1989 the state legislature had enacted a new provision that required counties to send advance ballots to UOCAVA voters at least forty-five days before a general election (the same period that the MOVE Act would incorporate two decades later), a fix that would have satisfied the federal court in 1984 and alleviated the need to accept late-arriving ballots.<sup>102</sup> Also in 1989, the legis-

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97. Imai & King, *supra* note 92, at 538.

98. See *Harris v. Fla. Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317, 1321–22 (N.D. Fla. 2000); Mazur, *supra* note 92, at 112.

99. See DEPT OF DEF., DOD MILITARY AND CIVILIAN PERSONNEL BY STATE-SEPTEMBER 30, 2009 at 11 (2009).

100. See *Harris*, 122 F. Supp. at 1322; Mazur, *supra* note 92, at 112–13.

101. See Mazur, *supra* note 92, at 113.

102. See *id.* at 114 (citing Act of July 5, 1989, ch. 338, 1989 Fla. Laws 2139). The advent of the Federal Write-In Absentee Ballot as part of UOCAVA in 1986 also completely altered the terrain on which the 1982 consent decree had been written. Florida's adoption of its own "advance" ballot in 1989 was a refinement of the relatively new federal require-

lature added a requirement that “only those ballots mailed with an APO, FPO, or foreign postmark shall be considered valid” overseas ballots<sup>103</sup> and preserved a provision requiring that all absentee ballots be received by 7:00 p.m. on Election Day.<sup>104</sup> Yet the local practice thereafter in Florida continued to be to follow the 1984 administrative rule and accept late-arriving overseas ballots as long as they bore the required postmark.<sup>105</sup>

But in the early aftermath of Election Day 2000, Florida’s secretary of state issued a problematic statement indicating that although overseas ballots must have been “executed” as of Election Day, “[t]hey are not required . . . to be postmarked *on or prior to* [Election Day].”<sup>106</sup> As a result, while some counties continued to require a timely postmark, others departed from this longstanding practice.<sup>107</sup> To some observers, the result was that many Florida counties may have accepted some overseas ballots that likely were cast after Election Day, contrary to Florida law.<sup>108</sup> Anecdotal reports confirmed that some military voters had completed their absentee ballot only after Election Day, once the added importance of their vote was apparent.<sup>109</sup>

Largely as a political matter, however, initial controversy over the possibility that Florida’s acceptance of late-arriving overseas ballots was an invitation to unlawful voting eventually gave way to expressions of the desirability of enfranchising as many military voters as possible.<sup>110</sup> Most famously, Gore’s running mate,

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103. Act of July 5, 1989, 1989 Fla. Laws at 2157–60. The foreign or military postmarks would enable election officials to confirm that the voter was a UOCAVA voter and thus eligible to cast an advance ballot or federal write-in absentee ballot and to continue to vote in Florida even if the voter no longer met the Florida residency requirement. *See Mazur, supra* note 92, at 114–15.

104. *See* Act of July 5, 1989, 1989 Fla. Laws at 2159–60 (codified as amended at FLA. STAT. § 101.67(2) (2008)).

105. *See Mazur, supra* note 92, at 107.

106. *See id.* (emphasis added) (quoting Statement of Katherine Harris, Secretary of State (Nov. 13, 2000), available at <http://election2000.stanford.edu/fl11-14deadline.pdf>).

107. *See* Richard Perez-Pena, *Counting the Vote: The Overseas Ballots*, N.Y. TIMES, Nov. 18, 2000, at A11.

108. *See Barstow & van Natta, supra* note 92.

109. *See id.*

110. *See Mazur, supra* note 92, at 108–10. This was true even though the number of overseas ballots arriving late suddenly increased approximately seven to ten days after Election Day, contrary to what arguably would be the expected pattern of declining numbers of overseas ballots with each passing day after the election. *See id.* at 119–21. One subsequent study concluded that of the late-arriving ballots that ultimately were included

vice-presidential candidate Joseph Lieberman, declared on a Sunday morning talk show twelve days after the election that Florida election officials should reconsider rejected overseas ballots “even if they might not comply with the law” and “give the benefit of the doubt to ballots coming in from military personnel.”<sup>111</sup> Gore also reportedly said privately that “[i]f I won this thing by a handful of military ballots, I would be hounded by Republicans and the press every day of my presidency and it wouldn’t be worth having.”<sup>112</sup>

Meanwhile, the Bush campaign continued to press for the inclusion of as many late-arriving overseas votes as possible. On November 22, Bush filed a state lawsuit asking that election officials in counties that had not done so count even those overseas ballots that bore a late postmark (or no postmark).<sup>113</sup> Three days later, after the circuit court judge suggested at a hearing that the lawful remedy might be to invalidate all late-arriving absentee ballots, as the judge apparently read the Florida statutes to require, Bush withdrew the suit.<sup>114</sup> The next day, he filed a new action seeking similar relief in federal district court,<sup>115</sup> and similar state court suits in five other Florida counties.<sup>116</sup> But by then, many of the counties were already reconsidering previously rejected ballots under more lenient standards.<sup>117</sup>

To some observers, the effort to count as many of these late ballots as possible may have heralded the triumph of a “substantial compliance” standard over a strict compliance standard<sup>118</sup> with

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in the official Florida results, 680 of them were “questionable.” Barstow & van Natta, *supra* note 92.

111. Richard Perez-Pena, *Counting the Vote: The Absentee Ballots*, N.Y. TIMES, Nov. 19, 2012, at A5 (internal quotation marks omitted); see Richard L. Berke, *Examining the Vote*, N.Y. TIMES, July 15, 2001, at A16.

112. See Barstow & van Natta, *supra* note 92 (internal quotation marks omitted).

113. Complaint for Declaratory and Injunctive Relief at 11, *Bush v. Bay Cnty. Canvassing Bd.*, No. 00-2799 (Fla. 2d Cir. Ct. Nov. 22, 2000).

114. See Mazur, *supra* note 92, at 110 (citing Notice of Voluntary Dismissal at 1, *Bay Cnty. Canvassing Bd.*, No. 00-2799 (Fla. 2d Cir. Ct. Nov. 25, 2000)).

115. Complaint at 13–14, *Bush v. Hillsborough Cnty. Canvassing Bd.*, 123 F. Supp. 2d 1305 (N.D. Fla. 2000) (No. 3:00CV533-LAC).

116. See Mazur, *supra* note 92, at 111.

117. See *id.*

118. For discussions on strict versus substantial compliance in election law, see Edward B. Foley, *How Fair Can Be Faster: The Lessons of Coleman v. Franken*, 10 ELECTION L.J. 187, 216–18 (2011); Edward B. Foley, *The Lake Wobegone Recount: Minnesota’s Disputed 2008 U.S. Senate Election*, 10 ELECTION L.J. 129, 142 (2011) [hereinafter *The Lake Wobegone Recount*]; Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 85–87

respect to Florida's overseas ballot requirements, thereby enfranchising a larger group of eligible voters.<sup>119</sup> Indeed, there is little evidence that very many of the late ballots were cast by ineligible voters or deliberately cast fraudulently.<sup>120</sup> But to other observers, the fact that many of these ballots—680 of those counted, by one analysis<sup>121</sup>—may have been unlawfully voted after the polls closed meant that their inclusion in the official results was an example of fundamental noncompliance with the standards, rather than of substantial compliance, thereby calling the legitimacy of the outcome into question.<sup>122</sup> To these observers, election officials counting these ballots failed in their duties by disregarding sound election procedures in favor of untenable legal arguments—and public bullying—on behalf of the politically popular cause of enfranchising the military.<sup>123</sup>

Those observers concerned about Florida's failure to follow its overseas ballot rules remind us that, even assuming that all the late ballots were cast by voters who were theoretically eligible to vote and had legitimately received an absentee ballot, no voters are eligible to vote after the polls close.<sup>124</sup> These voting standards ought to be enforced in a way that reasonably prevents any voter or group of voters from circumventing them or acquiring a special right to wait and see whether their votes matter.<sup>125</sup> Furthermore, differences between Florida counties in how election officials applied the state's overseas ballot standards meant that some voters failed to have their late votes count, while other voters succeeded<sup>126</sup>—an obvious departure from the Equal Protection principle

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(2009).

119. See Mazur, *supra* note 92, at 108–11.

120. See Barstow & van Natta, *supra* note 92. To be clear, there were reports that a small portion of late ballots were cast by voters who had not registered, had not requested an absentee ballot, or may already have voted. See *id.*

121. See *id.*

122. See *id.*

123. See Mazur, *supra* note 92, at 106, 130–31.

124. See Barstow & van Natta, *supra* note 92.

125. By 2008, when the outcome of the Minnesota senate race between Norm Coleman and Al Franken turned on the validity of several categories of absentee ballots, Democratic election lawyers had learned to make this argument without worrying that it would appear hostile to military or absentee voters. See Ned Foley & Steve Huefner, *Appendix: Lessons from Minnesota 2008 and Beyond: Reforming the Absentee Voting Process*, in AM. LAW INST. PRINCIPLES OF ELECTION LAW: RESOLUTION OF ELECTION DISPUTES 87–88 (2012).

126. See Barstow & van Natta, *supra* note 92; Mazur, *supra* note 92, at 108.

that the Supreme Court was about to articulate for state election administration in *Bush v. Gore*.<sup>127</sup>

It is impossible to determine what difference it would have made to the final results of the 2000 Florida election if state election officials had employed a strict standard of rejecting all overseas ballots that had not been cast by Election Day, or that did not bear the required postmark.<sup>128</sup> It is clear, however, that Florida's acceptance of late-arriving overseas ballots until ten days after Election Day did reverse the outcome of the presidential race. But this story has several additional implications for purposes of this article: (1) absentee and convenience voting measures must be implemented in ways that also protect the essential integrity of the election; (2) piecemeal efforts to increase turnout or improve voting convenience can be problematic, as they may easily beget unintended complexities; and (3) clarity is critical with respect to ballot processing rules. Section IV will say a little more about these lessons.

#### B. *Virginia 2008*

Virginia has a more recent story of UOCAVA difficulties in the 2008 presidential election. The story involves litigation over whether a federal court should require the Commonwealth to count late-arriving UOCAVA ballots in the face of a clear state statute that required an absentee ballot to arrive by the close of the polls in order to be counted.<sup>129</sup> This story, like the Florida story, therefore also presents a conflict between strict and substantial compliance with state voting rules, complicated by questions of how to construe the requirements of federal law.

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127. See 531 U.S. 98, 104–10 (2000).

128. The best effort to predict likely outcomes is from Professors Imai and King, who conclude that it is unlikely, but not impossible, that some 680 invalid ballots altered the outcome but that, in any event, the outcome would have been yet closer had these ballots not been included and, therefore, at the least could have shaped additional arguments about the Florida result. Imai & King, *supra* note 92, at 537–38, 542–45. In addition, one recent Florida case suggested that when the number of wrongfully included absentee ballots exceeded the margin of victory, but the votes on those ballots could no longer be specifically ascertained and removed from the tallies, the remedy was to exclude all affected absentee ballots. See *In re Protest of Election Returns & Absentee Ballots in the Nov. 4, 1997 Election for Miami*, 707 So. 2d 1170, 1172, 1174 (Fla. Dist. Ct. App. 1998); Barstow & van Natta, *supra* note 92.

129. See VA. CODE ANN. § 24.2-709(A) (Cum. Supp. 2012).

Precisely because absentee ballots from overseas voters had been essential to President Bush's victory in 2000 in Florida, the McCain campaign in 2008 was closely monitoring whether swing states were complying with their UOCAVA obligations to overseas and military voters.<sup>130</sup> The day before Election Day, the McCain campaign filed suit in the U.S. District Court for the Eastern District of Virginia, alleging that Virginia had violated UOCAVA by failing to send absentee ballots to UOCAVA voters sufficiently in advance of the election.<sup>131</sup> As relief, the campaign asked the court to order Virginia to accept and count UOCAVA ballots until the tenth day after the election, provided the ballots had been cast on or before Election Day.<sup>132</sup>

These late-arriving ballots, like their 2000 counterparts in Florida, could have determined the outcome had the 2008 election in Virginia been close. However, by the morning after Election Day (less than two days after the lawsuit was filed), it was clear that Obama's margin of victory was large enough that these ballots would not be critical.<sup>133</sup> Nevertheless, the question of the validity of these ballots remained important, if only for precedential reasons. The United States therefore intervened as an additional plaintiff ten days after the election,<sup>134</sup> relying on a UOCAVA provision that permits the United States (and only the United States) to seek to enforce the statute<sup>135</sup> (and thereby remedying the fact that under the same UOCAVA provision the McCain campaign actually lacked standing to seek enforcement of UOCAVA rights).<sup>136</sup> Feeling no particular pressure to resolve the lawsuit expeditiously, the court then considered the case for more than two years, issuing its final order late in 2010.<sup>137</sup>

When this lawsuit began in 2008, UOCAVA did not impose a specific date by which state election officials were required to

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130. See *United States v. Cunningham*, No. 3:08cv709, 2009 WL 3350028, at \*2 (E.D. Va. Oct. 15, 2009).

131. *Id.*

132. Complaint at 10, *Cunningham*, 2009 WL 3350028 (No. 3:08cv709).

133. See Andrea Stone, *Election Alters Face of the South*, USA TODAY, Nov. 5, 2008, at 6A.

134. *Cunningham*, 2009 WL 3350028, at \*2.

135. 42 U.S.C. § 1973ff-4 (2006 & Supp. V 2011).

136. The campaign eventually was dismissed from the suit, Order at 1, *Cunningham*, 2009 WL 3350028 (No. 3:08cv709), and the case was recaptioned *United States v. Cunningham*. See *Cunningham*, 2009 WL 3350028 at \*3.

137. See Consent Decree at 1, 6, *Cunningham*, 2009 WL 3350028 (No. 3:08CV709).

transmit ballots and related voting materials to overseas and military voters. Instead, it simply required that states “permit [military and overseas voters] to vote by absentee ballot.”<sup>138</sup> Both the McCain campaign and the United States argued that, to be meaningful, this provision obligated states to send ballots sufficiently before the election to allow time for round-trip mail delivery to remote military installations or overseas civilian addresses.<sup>139</sup> At the time, there was a growing sense within the UOCAVA community that an adequate round-trip ballot transit time for typical UOCAVA voters was more than one month and, ideally, perhaps as much as two months.<sup>140</sup> Indeed, in advance of the 2008 election, Virginia had committed to send UOCAVA ballots “no later than 45 days before [the election].”<sup>141</sup>

Nevertheless, less than thirty days before the November 2008 election a number of Virginia jurisdictions still had not sent absentee ballots to their UOCAVA voters.<sup>142</sup> Arguably as a result, the ballots cast by at least some UOCAVA voters did not arrive back in Virginia until after Election Day.<sup>143</sup> The McCain campaign, aware that many UOCAVA ballots had not been returned by the day before the election,<sup>144</sup> filed its suit in order to lay the foundation for counting these voters’ ballots later, should they prove critical to the outcome.<sup>145</sup>

By the time the federal district court issued its first substantive opinion on the merits of the case in October 2009,<sup>146</sup> Congress

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138. 42 U.S.C. § 1973ff-1(a)(1) (2006).

139. See Complaint, *supra* note 132, at 4–7; Complaint in Intervention at 2–4, *Cunningham*, 2009 WL 3350028 (No. 3:08cv709).

140. For example, as the complaint recited, the U.S. Election Assistance Commission, the Department of Justice, and the Department of Defense all were recommending that states send out UOCAVA ballots at least forty-five days ahead of the election. See Complaint, *supra* note 132, at 5–6. FVAP also was urging state legislatures to enact laws requiring that ballots be mailed at least forty-five days before an election. See *State Legislative Initiatives*, FEDERAL VOTING ASSISTANCE PROGRAM, <http://www.fvap.gov/reference/laws/state-initiatives.html> (last visited Feb. 18, 2013).

141. VA. STATE BD. OF ELECTIONS, GUIDELINES FOR VOTERS THAT REQUEST E-MAIL BALLOTS (2008), in Complaint, *supra* note 132, at ex. C; see VA. CODE ANN. § 24.2-612 (Supp. 2012).

142. See *Cunningham*, 2009 WL 3350028, at \*2.

143. See *id.* Other voters may even have given up, recognizing that they could not expect their voted ballot to reach Virginia by Election Day.

144. See Complaint, *supra* note 132, at 8–9.

145. See *id.* at 9–10.

146. See *Cunningham*, 2009 WL 3350028.

had almost completed the MOVE Act,<sup>147</sup> whose most important provisions would require all states to transmit UOCAVA ballots at least forty-five days before an election.<sup>148</sup> The court concluded that although UOCAVA had no such explicit requirement in 2008, the act implicitly required that states mail ballots reasonably early, which the court held to be at least thirty days before an election.<sup>149</sup> Concluding that Virginia had violated this requirement, the court ordered the Commonwealth to count all UOCAVA ballots that had arrived within thirty days after the November 2008 election, if they had been cast before Election Day, and revise the official results of the 2008 election accordingly.<sup>150</sup> The court also tasked the parties with developing a permanent response to the problem for future Virginia elections.<sup>151</sup>

Meanwhile, the McCain campaign's simple act of filing the suit, coupled with the United States' intervention and substitution as plaintiff in place of the campaign, brought additional attention to the problem of states' late transmission of blank ballots. Indeed, at the same time that the developing MOVE Act may have had some impact on the district court's eventual judgment about how much ballot transit time Virginia was obligated to provide, an inverse connection between Virginia's difficulties in 2008 and Congress's 2009 action also is likely. Virginia's difficulties accommodating UOCAVA voters, which the lawsuit helped bring to light, were an example of the continuing struggles of military and overseas voters, which prompted Senator Schumer and other key proponents of the MOVE Act to take action.<sup>152</sup>

After the MOVE Act became law in late October 2009 (its key provisions, including a forty-five-day advance transmission requirement for UOCAVA ballots, took effect for the 2010 federal

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147. See Pub. L. No. 111-84, 123 Stat. 2190 (2009); Remarks on Signing the National Defense Authorization Act for Fiscal Year 2010, 2009 DAILY COMP. PRES. DOC. 3 (Oct. 28, 2009) [hereinafter Remarks].

148. See 42 U.S.C. § 1973ff-1(a)(8) (2006 & Supp. IV 2011).

149. *Cunningham*, 2009 WL 3350028, at \*7.

150. *Id.* at \*9. Although initially the McCain campaign, and then the United States, as plaintiffs, had requested an order to count UOCAVA ballots received within ten days, by the time of the court's merits decision the United States had amended its requested relief to seek an order that all otherwise valid but late-arriving UOCAVA ballots be counted, regardless of when they arrived. See *id.* at \*3.

151. *Id.* at \*11.

152. See 156 CONG. REC. S4513-15, S4517-18 (daily ed. May 27, 2010) (statement of Sen. Charles E. Schumer) (detailing the "Background and Purpose of the MOVE Act" and the "Section-by-Section Analysis of the Move Act").



elections),<sup>153</sup> the federal district court's demand that Virginia develop a permanent solution was largely superfluous. As a result, the final consent decree that the court issued in December 2010 consisted primarily of monitoring, training, and data collection obligations, to remain in force through December 2012, which would ensure Virginia's compliance with UOCAVA as amended by the MOVE Act.<sup>154</sup> In the 2012 general election, Virginia apparently met its obligations to transmit ballots to UOCAVA voters no later than forty-five days before the election.<sup>155</sup>

Because the consent decree did not require Virginia to accept UOCAVA ballots after Election Day,<sup>156</sup> it raised little of the concerns about unlawful voting seen in Florida in 2000.<sup>157</sup> But the lawsuit did provide another illustration of the difficulty of getting absentee ballots out to UOCAVA voters and back by Election Day, as well as of the complexity of the interactions between state and federal election law. Indeed, the MOVE Act's new federal mandate requiring states to transmit UOCAVA ballots at least forty-five days before an election<sup>158</sup>—substantially earlier than many states' election officials traditionally have been ready to do so—does little to alleviate the tension between providing UOCAVA voters sufficient time to vote and meeting the administrative burdens of running an election, including preparing ballots and voting materials.

### C. *Ohio 2012*

The most recent UOCAVA voting controversy occurred in Ohio, another swing state in contemporary presidential elections. Although Ohio's military population is not as large as either Florida's or Virginia's,<sup>159</sup> nonetheless an even larger number of voters were potentially affected by the Ohio controversy because at issue were the voting rules applicable throughout the state to all non-

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153. See Pub. L. No. 111-84, 123 Stat. 2190 (2009); Remarks, *supra* note 147, at 3.

154. See Consent Decree, *supra* note 137, at 2–5.

155. Cf. Scott Bauer, *Romney Asks for Extension on Military Ballots; Election 2012*, WISC. STATE J., Oct. 3, 2012, at A11.

156. See Consent Decree, *supra* note 137, at 2.

157. See *supra* notes 106–28 and accompanying text.

158. 42 U.S.C. § 1973ff-1(a)(8) (2006 & Supp. IV 2011).

159. PROQUEST, LLC, PROQUEST STATISTICAL ABSTRACT OF THE UNITED STATES, 2013, at 347 (2013 ed., 2012).

UOCAVA voters.<sup>160</sup> In July 2012, the Obama campaign—Obama for America—filed a federal lawsuit against the Ohio secretary of state, seeking an order that would grant to the state’s regular voters the same in-person early voting opportunities on the final weekend before Election Day 2012 that the secretary of state had made available to UOCAVA voters.<sup>161</sup> The lawsuit was quickly characterized as an attack on military voting rights,<sup>162</sup> with headlines or article titles that included “Obama Campaign Sues in Bid to Suppress Military Vote”<sup>163</sup> and “Keeping the Military from Voting in Ohio.”<sup>164</sup> In fact, the Obama campaign was not seeking to limit military voting opportunities but, on the contrary, was relying on a convoluted confluence of state laws and regulations to argue that non-UOCAVA voters should receive similarly broad early voting options under the Equal Protection doctrine.<sup>165</sup>

### 1. The Legal Terrain Prompting the Lawsuit

The essential background to the suit begins with the fact that, from 2005 through 2010, Ohio’s early voting law permitted counties to conduct early in-person voting through the weekend and Monday immediately before Election Day.<sup>166</sup> In the 2008 presidential election, a number of Ohio counties, including Ohio’s urban centers, chose to do so, and as a result close to 100,000 Ohioans voted during this three-day period.<sup>167</sup> But in June 2011, as part of a sweeping election reform package dubbed House Bill 194, the Ohio legislature amended the state election code to halt early voting at 6:00 p.m. on the Friday before Election Day.<sup>168</sup> The prof-

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160. *Obama for Am. v. Husted*, 697 F.3d 423, 425–29 (6th Cir. 2012).

161. Complaint at 1–4, 19–20, *Obama for Am. v. Husted*, No. 2:12-CV-0636, 2012 WL 3765060 (S.D. Ohio Aug. 31, 2012).

162. See Matthew Larotonda, *Romney Says Obama Lawsuit Blocks Ohio Military Voters*, ABC NEWS (Aug. 4, 2012, 8:20 PM), <http://abcnews.go.com/blogs/politics/2012/08/romney-says-obama-lawsuit-blocks-ohio-military-voters>.

163. Todd Beamon, *Obama Campaign Sues in Bid to Suppress Military Vote*, NEWSMAX (Aug. 3, 2012), <http://www.newsmax.com/Headline/Ohio-military-vote-Democrats/2012/08/03/id/447552>.

164. Hans von Spakovsky, *Keeping the Military from Voting in Ohio*, THE FOUNDRY (Aug. 6, 2012, 5:23 PM), <http://blog.heritage.org/2012/08/06/keeping-the-military-from-voting-in-ohio/>.

165. Plaintiffs’ Motion for Preliminary Injunction at 3, *Obama for Am.*, 2012 WL 3765060 (No. 2:12cv00636).

166. *Id.* at 1–2.

167. *Id.* at 1.

168. Act of July 1, 2011, ch. \_\_\_, 2011 Ohio Laws \_\_\_, available at <http://www.legisla>

ferred reason for prohibiting early voting on the last three days was to ease the burdens on election officials of making final preparations for Election Day, including preparing up-to-date voter lists for use at the polls.<sup>169</sup>

Unfortunately, the legislative process by which Ohio reduced the early voting period was not a model of clarity, particularly with respect to the impact on the state's UOCAVA voters. The original intent of the legislative majority that enacted House Bill 194 appears to have been to establish Friday at 6:00 p.m. as the new deadline for all voters, including those covered by the state's UOCAVA provisions. House Bill 194 did so by adding the Friday 6:00 p.m. deadline to the election code in two places, one pertaining to UOCAVA voting<sup>170</sup> and the other pertaining to regular early voting.<sup>171</sup> The bill received no support from the Democratic minority in the legislature, however, because the final weekend of early voting was understood to facilitate Democratic turnout efforts and to favor Democratic candidates.<sup>172</sup> Accordingly, opponents of House Bill 194 quickly began contemplating a popular referendum to reverse its changes.<sup>173</sup>

Almost immediately after the passage of House Bill 194, the legislature realized that it had overlooked two other related sections of the existing code.<sup>174</sup> These sections, one for UOCAVA voters and one for all others, each specified the close of business on the Monday before Election Day as the end of early voting, three days later than House Bill 194's new Friday 6:00 p.m. deadlines.<sup>175</sup> The legislature recognized that it would need to pass a corrections measure to eliminate these inconsistencies.<sup>176</sup> At the time, the legislature was already working on House Bill 224, a measure intended primarily to incorporate into Ohio law certain expanded features of UMOVA, which the ULC had recently

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ture.state.oh.us/BillText129/129\_HB\_194\_EN\_N.html.

169. See *Obama for Am.*, 2012 WL 3765060, at \*5.

170. See H.R. 194, 129th G.A., Reg. Sess., sec. 1, § 3511.10 (Ohio 2011), available at [http://www.legislature.state.oh.us/BillText129/129\\_HB\\_194\\_EN\\_N.html](http://www.legislature.state.oh.us/BillText129/129_HB_194_EN_N.html).

171. See *id.* § 3509.01(B)(3) (Ohio 2011).

172. See Jim Siegel, *2012 Referendum Effort: New Election Law Spurs Repeal Push*, COLUMBUS DISPATCH, July 15, 2011, at 3B.

173. See *id.*

174. See *Husted Upholds Rule on In-Person Early Voting*, PLAIN DEALER (Cleveland), Oct. 15, 2011, at B5.

175. OHIO REV. CODE ANN. §§ 3509.03, 3511.02 (LexisNexis 2005 & Supp. 2011).

176. See *Husted Upholds Rule on In-Person Early Voting*, *supra* note 174.

promulgated.<sup>177</sup> Because of its purpose to facilitate military and overseas voting, House Bill 224 was receiving widespread bipartisan support.<sup>178</sup> Without controversy, House Bill 224 also became a vehicle to make “technical corrections” to the two code sections overlooked in House Bill 194 in order to bring all of Ohio’s statutory deadlines for early voting into harmony at 6:00 p.m. on the Friday before the election.<sup>179</sup> The legislature then enacted House Bill 224 in July 2011 with almost no opposition.<sup>180</sup>

Later in 2011, the signature-gathering effort to qualify the earlier measure, House Bill 194, for a referendum succeeded,<sup>181</sup> rendering its provisions ineffective at least until the outcome of the referendum at the next general election, which would not occur until November 2012. In May 2012, with this referendum looming on the horizon, the Ohio legislature opted to repeal House Bill 194 outright,<sup>182</sup> thereby avoiding the referendum entirely. However, the legislature chose not to repeal the “technical corrections” of House Bill 224 (which also were not a subject of the referendum concerning House Bill 194)<sup>183</sup> even though the corrections had been adopted in order to complete the business of House Bill 194.

As a matter of Ohio statutory law, these events produced the following state of affairs: (1) the two provisions enacted by House Bill 224 now provided that early in-person voting would termi-

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177. See H.R. 224, 129th G.A., Reg. Sess., sec. 1 (Ohio 2011), available at [http://www.legislature.state.oh.us/BillText129/129\\_HB\\_224\\_EN\\_N.html](http://www.legislature.state.oh.us/BillText129/129_HB_224_EN_N.html).

178. See *Unofficial Votes for H.B. 224*, OHIO GEN. ASSEMB., [www.legislature.state.oh.us/votes.cfm?ID=129\\_HB\\_224](http://www.legislature.state.oh.us/votes.cfm?ID=129_HB_224) (last visited Feb. 18, 2013).

179. H.R. 224, sec. 1, §§ 3509.03, 3511.02(C).

180. See *Unofficial Votes for H.B. 224*, *supra* note 178. Furthermore, House Bill 224 was passed as an “emergency” law, see *id.*, a type of measure that under the Ohio Constitution is not subject to popular referendum. See OHIO CONST. art. II, § 1d.

181. See Joe Hallett, *HB 194 Foes Turn in Signatures; Petitions Signed by 300,000-Plus Halt Election Law*, COLUMBUS DISPATCH, Sept. 30, 2011, at 1A; Press Release, Secretary of State, Secretary of State Husted Certifies HB 194 Referendum Petition Signatures (Dec. 9, 2011), available at <http://www.sos.state.oh.us/mediaCenter/2011/2011-12-09.aspx>.

182. Act of May 8, 2012, ch. \_\_\_, 2012 Ohio Laws \_\_\_.

183. Indeed, these provisions arguably could not have been subject to a referendum because House Bill 224 was passed as an emergency law, see *supra* note 180, although some ambiguity exists concerning whether House Bill 224 in its entirety was not subject to the referendum process, or just sections 3 and 4, the only provisions of the act declared within the text of House Bill 224 to be effective immediately as emergency measures. See H.R. 224, sec. 4. Nevertheless, the plaintiffs in *Obama for America v. Husted*, among others, claimed that the entire bill was not subject to the referendum process. See Complaint, *supra* note 161, at 12 n.1.

nate at 6:00 p.m. on the Friday before Election Day, both for voters covered by Ohio's UOCAVA provisions<sup>184</sup> and for all other voters;<sup>185</sup> (2) one pre-existing provision, which House Bill 194 would have changed to impose the same Friday 6:00 p.m. early voting deadline for regular voters, instead continued to provide merely that early voting for regular voters shall *begin* thirty-five days before the election<sup>186</sup> but (absent the House Bill 194 amendment) said nothing about when it ended; and (3) another preexisting provision which House Bill 194 also would have changed to impose a Friday 6:00 p.m. early voting deadline for UOCAVA voters instead, by its terms, continued to permit in-person voting for UOCAVA voters up through Election Day.<sup>187</sup> The two provisions concerning regular voters (one from the law existing before House Bill 194 and one from House Bill 224) were not in conflict, with one provision establishing when early voting began and the other establishing that it ended on the Friday before Election Day.<sup>188</sup> But the two provisions concerning UOCAVA voters (also one from the law existing before House Bill 194 and one from House Bill 224) now conflicted with each other, setting inconsistent in-person early voting deadlines for UOCAVA voters of either Election Day or 6:00 p.m. the previous Friday.<sup>189</sup>

To resolve this conflict, which the filing of the House Bill 194 referendum petition in September 2011 had created, the Ohio secretary of state issued an advisory in October 2011 that instructed counties to continue to allow in-person early voting for UOCAVA voters on the Saturday, Sunday, and Monday immediately before Election Day, notwithstanding the provision of House Bill 224.<sup>190</sup> The secretary of state thus chose to interpret the conflicting statutory provisions in a manner that protected the voting opportunities of UOCAVA voters as broadly as possi-

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184. OHIO REV. CODE ANN. § 3511.02(C) (LexisNexis 2012).

185. *Id.* § 3509.03 (LexisNexis 2012).

186. *Id.* § 3509.01(B)(2) (LexisNexis 2012).

187. *Id.* § 3511.10 (LexisNexis 2012).

188. *Compare id.* § 3509.01(B)(2) (LexisNexis 2012), *with id.* § 3509.03 (LexisNexis 2012).

189. *Compare id.* § 3511.10 (LexisNexis 2012), *with id.* § 3511.02(C) (LexisNexis 2012). It may seem anomalous to describe in-person voting on Election Day as "early voting," and indeed that is not the language of the statute. Instead, the provision at issue, section 3511.10, allows UOCAVA voters to appear in person at the local board of elections' office anytime between the thirty-fifth day before Election Day through the close of the polls on Election Day to vote an absent voter's ballot. *Id.* § 3511.10 (LexisNexis 2012).

190. JON HUSTED, OHIO SEC'Y OF STATE, ADVISORY 2011-07, at 2 (Oct. 14, 2011).

ble. As for non-UOCAVA voters, for the first time in six years, Ohio's November 2011 general election was conducted without early in-person voting on the three final days before the election.<sup>191</sup> It appeared that the same state of affairs would govern the November 2012 presidential election.

## 2. The Lawsuit and Its Outcome

On July 17, 2012, Obama for America, along with the Democratic National Committee and the Ohio Democratic Party, filed suit in the U.S. District Court for the Southern District of Ohio, challenging the apparently unintended result of a complicated set of state statutory changes, and its clarification through administrative directive, that permitted only the state's UOCAVA voters to vote early, in-person, on the final three days before Election Day.<sup>192</sup> The Obama for America lawsuit alleged that excluding all other voters from this early in-person voting violated the Equal Protection Clause.<sup>193</sup> As relief, Obama for America did not ask that UOCAVA voters be denied the chance to vote on these days, but instead sought an order restoring early voting for all Ohio voters on the final three days.<sup>194</sup>

To the surprise of many informed observers,<sup>195</sup> the federal district court granted the plaintiffs' motion for a preliminary injunction,<sup>196</sup> and a Sixth Circuit panel quickly affirmed the district court's decision.<sup>197</sup> The courts' responses were surprising to some because it was settled law that states could offer special voting accommodations for military and overseas voters without running afoul of the Equal Protection Clause, provided the states had a sufficient basis for the distinctions in treatment.<sup>198</sup> Of course, any Ohio voter covered by the state's peculiar early voting provisions would have to appear in person at a board of elections location in

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191. *Id.*

192. *See* Complaint, *supra* note 161, at 1–2.

193. *See id.* at 1, 17–19.

194. *See id.* at 20.

195. *See, e.g.,* Adam Liptak, *Justices Clear the Way for Early Voting in Ohio*, N.Y. TIMES, Oct. 16, 2012, at A15.

196. *Obama for Am.*, 2012 WL 3765060, at \*11.

197. *Obama for Am. v. Husted*, 697 F.3d 423, 425 (6th Cir. 2012).

198. *See* *Romeu v. Cohen*, 265 F.3d 118, 124 (2d Cir. 2001); *see also* *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969) (holding generally that limiting absentee voting provisions only to certain classes of voters does not violate Equal Protection Clause).

the three days immediately prior to Election Day in order to take advantage of those provisions.<sup>199</sup> In this respect, the voter would not be the prototypical example of a UOCAVA voter, who usually is voting in some remote location far from home. Nevertheless, Ohio offered a sensible justification to the court for making this accommodation only for UOCAVA voters: many of these voters are sometimes mobilized and sent away from their home precinct on very short notice, at which point their only voting option might be to vote early in person before deploying.<sup>200</sup>

The district court specifically discounted this proffered justification, however, largely on the basis that the secretary of state had left to each local board of elections the discretion to decide whether to conduct early in-person voting for UOCAVA voters on the last Saturday and Sunday, when offices were not required to have regular business hours.<sup>201</sup> This meant that Ohio law did not in fact ensure that the military voters who might need this extra voting opportunity, because of an abrupt deployment, would actually have it.<sup>202</sup> The court also discounted the state's claim that early in-person voting in the final three days before the election would impose heavy burdens on local election officials.<sup>203</sup>

As for the plaintiffs' asserted injury to the right to vote, the

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199. See OHIO REV. CODE ANN. § 3509.03 (LexisNexis 2012).

200. *Obama for Am.*, 2012 WL 3765060, at \*5 (quoting Defendants' Memorandum Contra Plaintiffs' Motion for Preliminary Injunction at 13–14, *Obama for Am.*, 2012 WL 3765060 (S.D. Ohio Aug. 1, 2012) (No. 2:12-CV-0636)).

201. See *id.* at \*5, \*9. The district court also noted that the secretary of state had completely prohibited early voting for all voters on all of the other weekends in the early voting period, which further undermined the state's claim that military voters needed additional accommodations because of the potential for abrupt deployments. See *id.* at \*5.

202. See *id.* at \*9–10. Although it played no role in the court's analysis, or even in the parties' arguments, it deserves mention that under UOCAVA a military voter must be "absent" from the voter's voting jurisdiction in order to take advantage of UOCAVA protections. See 42 U.S.C. § 1973ff-6(1) (2006). But UMOVA, by contrast, deliberately provides expanded coverage for all military voters on active duty (and their families), whether or not they are absent from their voting jurisdiction. See UNIF. MILITARY & OVERSEAS VOTERS ACT, § 2(9), 13 U.L.A. 80 (Supp. 2012); *id.* § 6, 13 U.L.A. 83 (Supp. 2012). The purpose of this expansion was to permit any military voters who were vulnerable to the possibility of a sudden deployment to use the UMOVA voting process, even while at home, as their default voting method, if they desired. In 2011, Ohio adopted this expanded UMOVA definition as part of House Bill 224, Act of May 8, 2012, ch. \_\_\_, 2012 Ohio Laws \_\_\_ (amending OHIO REV. CODE ANN. § 3511.01). UMOVA thus offers another response to the abrupt deployment problem that Ohio identified in defending its early voting system, though it still requires covered voters to submit a federal write-in absentee ballot or request the state's military and overseas ballot before the state's regular absentee ballot request deadline.

203. See *Obama for Am.*, 2012 WL 3765060, at \*10.

court readily concluded that it was substantial, potentially affecting thousands of disproportionately low-income and minority voters.<sup>204</sup> The court determined that even the possibility that a few UOCAVA voters might be able to participate in early voting, when other voters could not, amounted to an Equal Protection violation.<sup>205</sup> The court accordingly decided that, for purposes of early in-person voting in the final three days before Election Day, all Ohio voters had a constitutional right to participate in the voting process on an equal basis and that Ohio lacked a sufficient justification to restrict this right to only UOCAVA voters.<sup>206</sup>

The Sixth Circuit affirmed the district court's conclusion that the plaintiffs were likely to prevail on the merits of their Equal Protection claim.<sup>207</sup> The circuit court wrote that, had Ohio cut back on early voting consistently for all voters, "its 'important regulatory interests' would likely be sufficient to justify the restriction."<sup>208</sup> The problem was that Ohio's new regime was not uniformly applicable to all voters, and therefore the legal issue became, under the Supreme Court's 1992 decision in *Burdick v. Takushi*,<sup>209</sup> whether the state had a "sufficiently 'important' or 'weighty' interest 'to excuse the discriminatory burden it has placed on some but not all Ohio voters.'"<sup>210</sup> The circuit court, like the district court, found no state interest sufficient to justify the state's discriminatory treatment.<sup>211</sup> "While we readily acknowledge the need to provide military voters more time to vote, we see no corresponding justification for giving others less time."<sup>212</sup>

As for remedy, however, the district court decision seemed to do more than simply require Ohio to equalize (by leveling up) the voting processes for all voters. On the court's own analysis, providing equal treatment would merely have entailed requiring all Ohio counties to provide to all voters whatever weekend early voting, *if any*, each county chose to provide to UOCAVA voters.<sup>213</sup> But

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204. *See id.* at \*7.

205. *Id.*

206. *See id.* at \*10–11.

207. *Obama for Am. v. Husted*, 697 F.3d 423, 425 (6th Cir. 2012).

208. *Id.* at 433–34 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

209. 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 & n.9 (1983)).

210. *Obama for Am.*, 697 F.3d at 434, 436.

211. *See id.* at 436.

212. *Id.* at 435.

213. *See Obama for Am. v. Husted*, No. 2:12-cv-0636, 2012 WL 3765060, at \*9 (S.D.



the court's preliminary injunction appeared to require that the secretary of state establish a uniform schedule of final weekend voting hours for all voters across all counties.<sup>214</sup> In providing to all voters a broader early voting opportunity than the more modest accommodations to UOCAVA voters that Ohio was actually providing before the lawsuit, the decision clearly was an effort to echo the secretary of state's independently expressed commitment to "level the playing field" across all counties and ensure that Ohio voting is "uniform, accessible for all, fair, and secure."<sup>215</sup>

The Sixth Circuit, in affirming the district court's preliminary injunction, read the remedy differently. Instead, it construed the district court's remedial provisions to require only that, whatever early in-person voting hours an individual Ohio county decided to provide to UOCAVA voters, it must also provide them to all voters.<sup>216</sup> "But the State is not affirmatively required to order the boards to be open for early voting."<sup>217</sup> Nevertheless, when the U.S. Supreme Court denied Ohio's motion for a stay of the circuit court's decision ten days later,<sup>218</sup> that same day the Ohio secretary of state issued a directive setting uniform statewide hours for early in-person voting for all voters on the three days prior to Election Day: Saturday from 8 a.m. to 2 p.m.; Sunday from 1 p.m. to 5 p.m., and Monday from 8 a.m. to 2 p.m.<sup>219</sup>

The Obama campaign had successfully restored early in-person voting on the final weekend before Election Day for all voters on the basis of Ohio's unusual grant of that voting opportunity to UOCAVA voters. The judicial outcome appears to be a first in requiring equal treatment of both UOCAVA and non-UOCAVA voters with respect to a particular aspect of the voting process. The decision thus inevitably invites more attention to the distinctions

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Ohio Aug. 31, 2012).

214. *See id.* at \*11.

215. *See id.* at \*3, \*11 (citations & internal quotation marks omitted).

216. *Obama for Am.*, 697 F.3d at 437.

217. *Id.*

218. *Husted v. Obama for Am.*, 568 U.S. \_\_\_, \_\_\_, 133 S. Ct. 497, 497 (2012).

219. JON HUSTED, OHIO SEC'Y OF STATE, DIRECTIVE NO. 2012-50 (Oct. 16, 2012).

between these two categories of voters and to distinctions between the voting processes available to them, as discussed further below.<sup>220</sup>

#### IV. BROADER IMPLICATIONS OF DEVELOPMENTS IN UOCAVA VOTING

From the Civil War to the present, accommodations for military voters have influenced the voting alternatives also available to other voters. Not surprisingly, therefore, recent controversies about UOCAVA voting offer lessons for contemporary voting processes generally. They also confirm the continuing need to refine state UOCAVA laws and further standardize the accommodations offered to military and overseas voters, which the widespread adoption of UMOVA would accomplish.

##### A. *Connections Between UOCAVA Voting and Other Voting Methods*

Over the years, UOCAVA voters have received many accommodations, in both federal and state law, intended to facilitate voting by a group of voters with unique voting challenges. Yet the effort to find secure and effective ways to serve military voters often has inured to the benefit of other voters who do not face the same challenges. General absentee voting of course received a substantial boost from the successful experience with military voting in the Civil War.<sup>221</sup> Generations later, the need during World War I and World War II to accommodate military voters who were not only out of their home state but entirely out of the country prompted additional accommodations,<sup>222</sup> which eventually enabled widespread absentee voting by civilian voters abroad.<sup>223</sup> Indeed, the UOCAVA itself is an interesting hybrid of accommodations to assist both military and overseas civilians—two groups of voters who share certain difficulties in voting but are not identically situated.<sup>224</sup>

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220. See *infra* notes 226–45 and accompanying text.

221. See *supra* notes 14–25 and accompanying text.

222. See *supra* notes 29–43 and accompanying text.

223. See *supra* notes 50–60 and accompanying text.

224. In some ways the pairing of these two groups of voters may have helped maintain bipartisan support for the set of accommodations that these voters receive collectively. To

Today, both the MOVE Act and the UMOVA, which the ULC has recommended for adoption by all states, seek to further assist military and overseas voters by requiring states to use electronic methods to speed the distribution of voting materials to these voters, including unvoted absentee ballots.<sup>225</sup> As election officials, voters, the media, and other groups become more familiar with these methods, it is likely that electronic transmission will also become increasingly common for other categories of absentee voters even if electronic transmission of *voted* ballots remains controversial.<sup>226</sup> Thus, a voting accommodation prompted by the critical need that UMOVA voters have more time to cast their absentee ballots<sup>227</sup> ultimately could also provide additional voting convenience to all voters. Likewise, the use of a single postcard application to enable UOCAVA voters to simultaneously register to vote and request an absentee ballot is being promoted as an innovation that should be available to all voters.<sup>228</sup>

The relationship between UOCAVA voting and traditional voting often runs in the opposite direction as well. For instance, with the widespread adoption of the Australian ballot, ballot secrecy became paramount for voting generally.<sup>229</sup> But protecting voter privacy—as well as voter autonomy and independence—is much more difficult for absentee voting than it is for polling place voting. Various witness and notarization requirements were therefore attached to absentee voting as it became more widespread.<sup>230</sup> These requirements then were carried over to the processes used for military and overseas voting as well, even though military and overseas voters often have very limited access to a notary public or a competent witness.<sup>231</sup> Over time, the overseas and military

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the extent that military voters, in an era of an all-volunteer military, are seen as more likely, as a group, to favor conservative candidates and policies, while overseas civilian voters, as a group, are seen as more likely to favor more progressive candidates and policies, support for measures like UOCAVA and UMOVA then need not be perceived as an attempt to advantage one party or ideology. Of course, at bottom the hope remains that most support for these measures results from the view that it is simply right to provide meaningful assistance to both sets of voters.

225. See *supra* notes 76–80 and accompanying text.

226. See *supra* note 76.

227. See *supra* notes 65–68 and accompanying text.

228. See Susan Dzieduszycka-Suinat, *Improved Absentee Balloting Processes Essential to the “Fix,”* ELECTION L. BLOG (Nov. 9, 2012, 3:10 PM), <http://electionlawblog.org/?p=43992>.

229. See *supra* notes 26–31 and accompanying text.

230. See FORTIER, *supra* note 16, at 10–11.

231. Cf. *id.* at 11. Some witness requirements provided that the witness must be a U.S.

voting communities encountered enough difficulty with these requirements that they successfully lobbied the ULC to replace them in UMOVA with the requirement of a voter affirmation, signed under penalty of perjury.<sup>232</sup>

Most of this cross-fertilization between UOCAVA voting and traditional voting has resulted through simple borrowing or sharing of administrative solutions among policymakers. In contrast, the *Obama for America* litigation offers a dramatic departure from this model, showcasing the use of judicial power, rather than legislative or administrative policymaking, to mandate the extension to all voters of an accommodation that the policymakers had restricted to only UOCAVA voters.<sup>233</sup> It thus raises questions about the limits of judicial power in overseeing policymakers' efforts to accommodate military and overseas voters. Indeed, to some, the *Obama for America* case is the proverbial camel's nose, threatening to bring down the entire tent of accommodations designed specifically for UMOVA voters. This was the primary basis on which various military groups intervened in the case to oppose the plaintiffs' motion for a preliminary injunction.<sup>234</sup>

But the case need not be seen as a threat to UOCAVA voting for several reasons.<sup>235</sup> First, centrally important to this use of judicial power was that both the federal district court and the Sixth Circuit were heavily influenced by the fact that the relevant policymakers—the Ohio General Assembly—had from 2005 through 2010 allowed early in-person voting *for all voters* on the final weekend and Monday before Election Day.<sup>236</sup> The prelimi-

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citizen or even be a registered voter in the same state, a problematic requirement for many military and overseas voters. See Matthew W. Potter, *Confusion in Minnesota Senate Election: Could It Happen in Missouri*, 65 J. MO. B. 269, 302 (2009).

232. Section 4(e) of UMOVA requires each state's chief elections officer to prescribe a declaration for the voter to sign, containing the same content as the declaration already in use on the federal write-in absentee ballot. UNIF. MILITARY & OVERSEAS VOTERS ACT § 4(e), 13 U.L.A. 82 (Supp. 2012). In turn, the voter must sign the affirmation under penalty of perjury. *Id.* § 13, 13 U.L.A. 88 (Supp. 2012).

233. See *supra* notes 195–219 and accompanying text.

234. See Brief of Intervenor Defendants-Appellants Military Group at 3, *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012) (No. 12-4076).

235. For further elaboration on these points, see Steven F. Huefner, *Why the Ohio Early Voting Case Is Not a Threat to UOCAVA Voting*, 74 OHIO ST. L.J. FURTHERMORE 89 (2013).

236. *Obama for Am.*, 697 F.3d at 433 (citing *League of Women Voters v. Brunner*, 548 F.3d 463, 477–78 (6th Cir. 2008)); *Obama for Am. v. Husted*, No. 2:12-cv-0636, 2012 WL 3765060, at \*7 (S.D. Ohio Aug. 31, 2012).

nary injunction was ordering Ohio to *restore* this early voting for all voters, not ordering Ohio to extend it to them for the first time.<sup>237</sup> As others have observed, the judicial response therefore implicitly had something of a “non-retrogression” principle lurking in it.<sup>238</sup> With this background, the courts considering the *Obama for America* case simply were not persuaded that the UOCAVA voters’ needs for early in-person voting in the final three days were sufficiently different from the needs of other voters to justify the elimination of this early voting option for traditional voters but not for UOCAVA voters.<sup>239</sup> The courts also reached this result in part because they concluded that the preferential treatment that UOCAVA voters were receiving would not even reliably meet the needs of those voters that Ohio had used to justify this treatment<sup>240</sup> and because they discounted the state’s assertions about the burdens of maintaining early voting for all voters.<sup>241</sup>

In these respects, the courts’ weighing of the state’s proffered reasons for granting favorable treatment to UOCAVA voters against the discriminatory burden of this treatment on other voters is likely *sui generis*.<sup>242</sup> Courts will surely continue to uphold favorable treatment for military and overseas voters when the accommodations are demonstrably intended to respond to these voters’ particular needs. This is likely to be true even when the

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237. *Obama for Am.*, 697 F.3d at 437.

238. See Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, \_\_\_ GEO. WASH. L. REV. (forthcoming 2013); Edward B. Foley, *Non-Retrogression, Equal Protection, and Ohio’s Early Voting Case*, ELECTION LAW @ MORITZ (Sept. 6, 2012), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=9673>.

239. See *supra* notes 198–212 and accompanying text.

240. See *supra* notes 201–02 and accompanying text.

241. See *supra* notes 203 & 211 and accompanying text. The key fact here was that Ohio had successfully conducted final weekend early voting for the six previous years. See *supra* note 166 and accompanying text.

242. Even before the circuit court’s decision, Ned Foley had deconstructed the *sui generis* nature of this case into discrete parts, none of which alone is *sui generis*, to argue that as a matter of legal doctrine the resulting judicial outcome was by no means compelled. See Edward B. Foley, *Two Big Cases Ready for Major Appellate Rulings*, ELECTION LAW @ MORITZ (Sept. 30, 2012), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=9779>; see also Edward B. Foley, *Analyzing a “Voting Wars” Trifecta*, Election Law @ Moritz (Aug. 16, 2012), [www.moritzlaw.osu.edu/electionlaw/freefair/index.php?ID=9579](http://www.moritzlaw.osu.edu/electionlaw/freefair/index.php?ID=9579). But likewise, the fact that the federal courts granted and sustained the preliminary injunction on the basis that the plaintiffs had shown a likelihood of success on their Equal Protection claim also does not compel (or even favor) the conclusion that in future cases, in which the combination of factors in this case is lacking, an Equal Protection analysis will threaten typical accommodations for UOCAVA voters.

burden on the state of extending similar accommodations to all voters would be slight, as long as that burden is genuine.<sup>243</sup>

Accordingly, in the *Obama for America* case the courts themselves showed no interest in resolving the Equal Protection concern by doing away with UOCAVA voters' early voting options in a "leveling down" of the playing field.<sup>244</sup> Instead, the courts showed continuing solicitude for UOCAVA voters and for the state's efforts to accommodate their needs, noting that the preliminary injunction continued to offer military voters full access to early voting.<sup>245</sup> In principle, the decisions fully embraced the appropriateness of special accommodations limited to UOCAVA voters when the state's proffered reasons for limiting their availability were sufficient and those accommodations offered meaningful assistance.

#### B. *Broader Lessons for Absentee Voting and Early In-Person Voting*

The continuing effort to enhance the voting experience and opportunities of military and overseas voters is itself merely part of a larger set of efforts to enhance the voting experience and opportunities of all voters. These efforts include increasing the availability of early in-person voting and permitting absentee balloting by all voters who wish to use it, not just those who would be unable to reach their traditional polling place on Election Day. As of 2012, thirty-two states had some form of early voting, and twenty-seven states permitted any voter to cast an absentee ballot by mail.<sup>246</sup> This is a dramatic increase over the past decade.<sup>247</sup> Mean-

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243. As Michael Kang has argued, part of the problem that Ohio faced in defending its early voting scheme was that the state's six-year history of successful early voting on the final weekend undercut the claim that the reduction in early voting hours, for all but UOCAVA voters, was intended to reduce the burdens on election officials. See Michael S. Kang, *Michael Kang Responds to Foley on Obama for America Early Voting Principle*, ELECTION LAW @ MORITZ (Sept. 7, 2012), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=9689>.

244. Cf. *supra* notes 204–17 and accompanying text.

245. See *Obama for Am. v. Husted*, 697 F.3d 423, 434–35 (6th Cir. 2012); *Obama for Am. v. Husted*, No. 2:12-cv-0636, 2012 WL 3765060, at \*10 (S.D. Ohio Aug. 31, 2012).

246. See *Absentee and Early Voting*, NAT'L CONFERENCE OF STATE LEGISLATURES (Sept. 4, 2012), <http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx>.

247. See Paul Gronke, *Early Voting Reforms and American Elections*, 17 WM. & MARY BILL RTS. J. 423, 423–24 (2008); Paul Gronke & Dan Tokaji, *The Party Line*, 10 ELECTION L.J. 71, 71 (2011).

while, at the same time that the number of states offering these alternatives also has been increasing, the number of voters taking advantage of these alternatives to traditional voting has also been on the rise in states where they are already offered.<sup>248</sup>

Do these nontraditional voting methods also actually increase turnout and, in that sense, help to “Get Out the Vote?” Although the UOCAVA clearly has been intended to increase the voting participation rate of military and overseas voters, conventional wisdom had become that neither early voting nor no-excuse absentee voting had much impact on general voter turnout.<sup>249</sup> Instead, these measures were seen largely to enhance voter convenience for essentially the same set of voters who would vote anyway. But some recent studies offer preliminary indications that at least the timing of early voting opportunities, and particularly the inclusion of weekend voting, can affect turnout by enabling certain voters to get to the polls more easily than on a work day.<sup>250</sup> Indeed, were this not at least perceived to be so, the partisan squabbling about early voting that occurred not only in Ohio<sup>251</sup> but also in Florida<sup>252</sup> last year would surely not have been so strong.

But even if nontraditional voting methods only increase the convenience of voting, without expanding turnout, these measures could offer one of the better solutions to the problems of long lines at polling places on Election Day, problems that again plagued some states this past year.<sup>253</sup> Indeed, Ohio’s extended period

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248. See Michael P. McDonald, *Early Voting in 2012: What to Expect*, HUFFINGTONPOST (Aug. 13, 2012), [http://www.huffingtonpost.com/michael-p-mcdonald/early-voting-in-2012-what\\_b\\_1773768.html](http://www.huffingtonpost.com/michael-p-mcdonald/early-voting-in-2012-what_b_1773768.html); see also Michael P. McDonald, *2012 Early Voting Statistics*, U.S. ELECTIONS PROJECT (Nov. 6, 2012), [http://elections.gmu.edu/early\\_vote\\_2012.html](http://elections.gmu.edu/early_vote_2012.html).

249. See, e.g., FORTIER, *supra* note 16, at 42–45 (summarizing several empirical studies).

250. See R. Michael Alvarez, Ines Levin & J. Andrew Sinclair, *Making Voting Easier: Convenience Voting in the 2008 Presidential Election*, 65 POL. RES. Q. 248, 248 (2012); Michael C. Herron & Daniel A. Smith, *Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355*, 11 ELECTION L.J. 331 (2012).

251. See *supra* notes 192–219 and accompanying text.

252. See *Democrats Sue to Extend Florida’s Early Voting*, THE CAUCUS BLOG, N.Y. TIMES (Nov. 4, 2012), <http://thecaucus.blogs.nytimes.com/2012/11/04/democrats-sue-to-extend-floridas-early-voting/>; see also Beth Fouhy, *Florida County Extends Early Voting*, TEL. HERALD (Dubuque, Iowa), Nov. 5, 2012, at A6.

253. See Ethan Bronner, *Long Lines, Demands for ID and Provisional Ballots Mar Voting for Some*, N.Y. TIMES, Nov. 4, 2012, at P9; see also *supra* note 3 and accompanying text.

of early voting, which from 2005 through 2010 permitted voting on multiple weekends, not just the last weekend before Election Day, was primarily a response to long lines at the polls in the November 2004 election.<sup>254</sup> One reason that early and absentee voting methods have grown so dramatically is that election administrators also have supported them as a means of reducing the pressures on Election Day voting.<sup>255</sup>

However, the dramatic increases in nontraditional voting have not always occurred with enough attention to the potential downsides of these methods or how to reduce those problems through good design. Moreover, the dramatic increases in the use of these methods make it even more important that these methods be fair and structured to minimize errors and mistakes in the voting process. Fortunately, the recent controversies surrounding UOCAVA voting methods help to illuminate key characteristics of well-designed systems of non-traditional voting.

#### 1. Downsides of Nontraditional Voting Methods—A Cautionary Note

The potential benefits of nontraditional voting, whether only in terms of increased convenience or also improved turnout, often receive most of the attention, sometimes without careful balancing against the attendant risks or costs. Obviously, if a particular method of nontraditional voting primarily offers increased convenience, but not increased turnout, its potential costs will loom larger in the balance with its benefits. Accordingly, a brief note is in order about the most significant costs of both absentee voting and early voting, the two dominant methods of convenience voting. Each has its own set of downside issues.

Absentee voting has two main problems. First, in multiple respects, it is much less secure than traditional polling place voting. Because the voter casts the ballot away from the polling place and the supervision of election officials, the ballot is no longer necessarily secret. That simple fact begets opportunities for several types of fraudulent absentee voting. First, absentee voters can sell their votes by letting buyers observe (and even partici-

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254. See *Obama for Am. v. Husted*, 697 F.3d 423, 426 (6th Cir. 2012).

255. See Lizette Alvarez, *Court Approves Schedule for Florida Early Voting*, N.Y. TIMES, Sept. 14, 2012, at A16.



pate in) the vote casting. Second, absentee voters, in the very moment of voting, can be influenced or pressured to vote in particular ways by relatives, friends, work associates, religious leaders, care-givers, and so on, depending on where the voter marks the ballot. Third, absentee ballots can be intercepted by individuals other than the voters and cast on behalf of a voter who may never be aware that this fraud has even occurred.

The second type of problem with absentee voting is that voter mistakes, either in completing the absentee ballot return envelope or in marking the ballot itself, can effectively disenfranchise a voter. Ballot return envelopes that lack essential voter information, whatever that is defined to include in a particular state, will not be eligible to be counted unless the state has a mechanism for the voter to cure the defect before the canvassing deadline (and the voter takes advantage of that mechanism).<sup>256</sup> In contrast, a voter who goes to the polling place to vote runs none of this risk of having the entire ballot ignored. Meanwhile, absentee ballots on which a voter “overvotes,” or mistakenly marks two choices for a particular race, will not be counted for that race.<sup>257</sup> But when marking a ballot at a polling place, in-precinct ballot scanners can alert the voter in real time to the overvote problem, allowing the voter to void the mismarked ballot and complete a new ballot.<sup>258</sup> In-precinct ballot scanners also can alert voters who mistakenly have neglected to vote in a particular race, thereby avoiding the problem of unintentional “undervotes.”<sup>259</sup> Absentee balloting offers no protection against this error either. (Electronic voting by touch screen, the other dominant mode of in-person voting, avoids both of these problems even sooner by prohibiting overvoting entirely and by alerting the voter to unintentional undervoting before the voter leaves the voting booth.)

Early in-person voting, because it occurs in a polling place, thus, has neither of the categories of problems associated with absentee voting. But it does have other costs. Logistically, it can be more complicated for election officials to manage than absentee balloting because it requires staffing voting locations for days,

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256. See *The Lake Wobegone Recount*, *supra* note 118, at 132.

257. See, e.g., Carlos Illescas, “Overvote” Means No Vote in Race, DENVER POST, Nov. 1, 2012, at 2A.

258. See Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1718 (2005).

259. See *id.*

if not weeks, rather than only on Election Day.<sup>260</sup> In some jurisdictions, extensive early voting using existing election facilities and staff may actually save money,<sup>261</sup> but in other locations, it may require additional paid staff.<sup>262</sup> To the extent that disparities in the costs of early voting—or differences in any other logistical factors or other considerations—give rise to disparities in the availability of early voting around a state, Equal Protection concerns or fairness problems may arise. Finally, by definition early voting, whether in-person or absentee, means that not all voters are deciding on the basis of the same set of facts, as late-breaking information cannot influence the votes of those who have already cast an in-person ballot or mailed an absentee ballot. The further in advance early voting is available, the greater the risk that some voters will cast ballots on the basis of what the voters themselves might subsequently regret was incomplete information.

## 2. General Principles Applicable to All Forms of Convenience Voting

The preceding cautionary notes suggest several essential components of well-designed convenience voting systems, as do some of the key lessons highlighted by recent UOCAVA voting controversies. Some of these lessons are particular to a given type of system, but others have more universal application. For instance, when subjected to intense pressure in 2000, Florida's UOCAVA voting system was managed in ways that did not properly protect the essential integrity of the election, as described in Section II above.<sup>263</sup> One significant contributing factor was the lack of clarity and consistency in the state's rules for processing late-arriving ballots, which in turn was the unintended result of the somewhat piecemeal way in which the state's process for accommodating UOCAVA voters had come together.<sup>264</sup> Any voting system should work to avoid these kinds of problems.

To that end, any system of convenience voting should honor at least these essential principles:

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260. See Paul Gronke, *Early Voting Is a Crucial Fix, but It's Not Flawless, in A Better Way to Vote*, N.Y. TIMES, Nov. 11, 2012, at SR3.

261. See *id.*

262. See *id.*

263. See *supra* notes 98–127 and accompanying text.

264. See *supra* notes 98–108.

(1) the system must be designed to preserve and enhance fairness to all voters, including ensuring that its processes lend themselves to consistency in application and that state and federal requirements mesh seamlessly;

(2) the system should be structured to minimize post-election issues, shifting as many discretionary decisions by judges, election officials, or other administrators as possible to the pre-election stage, before outcomes are known;

(3) voting rules should be simple, clear, and established well in advance (and also widely shared in advance) in order to further minimize post-election litigation and controversy, as well as to further maximize consistency in application; and

(4) the system must be both reliable and perceived as reliable.

Of course, operationalizing these principles in a specific state election system may be easier said than done. Even a system that appears well designed on paper may in fact prove difficult to administer reliably. In part, that was the lesson of Virginia's 2008 difficulties in transmitting UOCAVA ballots before the MOVE Act's forty-five-day deadline: the Commonwealth simply failed to meet its obligations, prompting the McCain campaign to seek proactive relief.<sup>265</sup> But another lesson of Virginia's 2008 difficulties is that our hybrid election system, in which new federal law requirements often are grafted upon long-standing state law requirements and cultures, can create undesirable complexities that may thwart effective implementation, at least for a time. Understanding the interconnections between state and federal law, both in theory and in practice, thus becomes a critical component of sound system design.

### 3. Principles of Sound Early In-Person Voting

In addition to the preceding general principles, several more concrete principles should apply specifically to early in-person voting:

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265. See Complaint at 7, *United States v. Cunningham*, No. 3:08cv709 (E.D. Va. Nov. 3, 2008). The McCain campaign's decision to file suit concerning this failure before Election Day could itself be characterized as a type of effort to avoid post-election litigation, raising issues before the nature of those claims reflects the unofficial outcomes.

- (1) early-voting hours should be meaningful, convenient, and well-publicized;
- (2) an early-voting period should not extend too far before Election Day but should include at least one full weekend;<sup>266</sup>
- (3) early-voting locations should be inviting, convenient, and well-publicized;
- (4) early-voting options should be uniform throughout the state (smaller jurisdictions may need some flexibility—or some state assistance—in identifying or staffing early-voting locations, but all voters should have comparable opportunities to participate);
- (5) voting equipment and processes used for early voting should be identical to those used in the jurisdiction on Election Day and should permit correction of overvotes and undervotes; and
- (6) results of early voting must not be tallied before the close of polls on Election Day.

The final two principles should be uncontroversial, but some brief observations are in order about the first four principles. The specific number of days and hours of meaningful early voting could differ in different states, based on population densities, economic conditions, and cultural factors. In urban centers, early voting locations should be near public transportation or otherwise readily accessible. With these location-specific factors in mind, early voting must be designed to offer meaningful alternatives to the difficulties that some voters may have in voting on Election Day. In order to enhance both public awareness and fairness to voters, whatever early voting is established should be uniform throughout the state, clearly communicated, and stable over time. While the same period of early voting may not make sense for a presidential election as for an entirely municipal election, in the long-term it is desirable that the early-voting period for a presidential election be generally consistent across presidential elections.

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266. A ten-day period, starting two Saturdays before Election Day, offers one good approach.

#### 4. Principles of Sound No-Excuse Absentee Voting

Several different principles also should apply specifically to absentee voting:

(1) required paperwork, transmission envelopes, and other processes should be simple, understandable, and voter friendly in order to minimize uncountable ballots;

(2) the submission process must include some mechanism to guard against voting an absentee ballot after Election Day;

(3) the submission process must include some mechanism to guard against selling absentee votes, voting under duress, and other types of fraudulent voting;

(4) absentee ballots should be processed centrally at county boards of elections (or municipal boards of elections in those few states that administer elections at the municipal level), rather than at the precinct level, in order to increase the uniformity with which they are reviewed (and in any event, the standards for processing absentee ballots must, as described as a general principle above, be clear and settled in advance);

(5) absentee voters should receive notice of defects concerning their ballot transmission envelopes that affect the eligibility of their ballot and should have the opportunity to correct these defects during the time that the state is also processing provisional ballots in those situations in which correction is possible; and

(6) because of the greater risks of fraud and mistake in absentee voting, states should prefer the establishment of meaningful early in-person voting opportunities over no-excuse absentee voting; a state with meaningful early in-person voting should limit its absentee voting to only those voters who are not able to take advantage of early in-person voting or regular Election Day voting.

A particular clarification is in order regarding the second and third principles. With respect to the second principle, one obvious way of ensuring that an absentee ballot has not been voted after Election Day is to require that the ballot be received by Election Day. This is a sensible requirement for ballots not coming from overseas. But until the overseas transmission of ballots and balloting materials becomes faster, an Election Day deadline may be

too soon for UOCAVA voters. A postmark on or before Election Day would also be acceptable and, in theory, would permit both domestic and overseas absentee voters to cast their ballot a little closer to Election Day than would a requirement that election officials must receive the voted ballot by Election Day. But the UOCAVA community remains concerned that, although in theory all military mail should receive a postmark at some point in its processing, in a small portion of cases the postmarking may not occur for several days after the mail has been placed into the military mail system and, therefore, may not accurately reflect when the ballot was voted.<sup>267</sup> Accordingly, for UOCAVA voters, the voter's affirmation under penalty of perjury ought to be acceptable.

With respect to the third principle, a similar approach could suffice: require the voter to affirm under penalty of perjury that the ballot accurately reflects the voter's own uncoerced, unbought preferences. Especially for UOCAVA voters, as previously described this is substantially more voter friendly than requiring a notary public to witness the ballot.<sup>268</sup> Many states already no longer require either notarization or witnessing of absentee ballots for non-UOCAVA voters as well.<sup>269</sup>

### C. *UMOVA's Potential Contributions*

As described in Section II above, America's initial responses to the voting challenges facing military personnel occurred at the state level.<sup>270</sup> With time, Congress also became involved (though it could do so only with respect to elections for federal office).<sup>271</sup> Today, the result of Congress's persistent interest over many decades is UOCAVA as amended by the MOVE Act.<sup>272</sup> Yet difficulties persist for military and overseas voters.

UOCAVA voting difficulties persist in part because elections continue to be conducted at the state level, and voting procedures vary widely across states. These state differences have made it harder for various groups and individuals, including the FVAP,

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267. See, e.g., U.S. ELECTION ASSISTANCE COMM'N, UOCAVA VOTERS AND THE ELECTRONIC TRANSMISSION OF VOTING MATERIAL IN FOUR STATES 17 (2007).

268. See *supra* notes 231–32 and accompanying text.

269. See, e.g., *The Lake Wobegone Recount*, *supra* note 118, at 131–32.

270. See *supra* notes 13–36 and accompanying text.

271. See *supra* notes 35–52 and accompanying text.

272. See *supra* notes 57–83 and accompanying text.

military voting assistance offices, voting assistance officers, state department officials, and non-governmental organizations, to help individual voters navigate the particular requirements applicable to them individually.<sup>273</sup> In addition, the federal overlay on state election administration adds complexity and increases the risk of problems, as evidenced in some way by each of the three controversies described in Section III above.

As of this writing, no data were yet available concerning military and overseas voter participation rates in the 2012 presidential election. Additional empirical research about the impact of the federal MOVE Act, as well as of various state adoptions of a UMOVA equivalent, is certainly in order. But even without awaiting that additional data, the need to continue refining the voting process for military and overseas voters seems clear. For instance, the latest round of complaints about these voting processes included the refrain that the Department of Defense was not adequately helping military personnel.<sup>274</sup> Of course, if state laws were clear and uniform, the need for this assistance would be substantially reduced. Increased standardization thus remains a central need.

Though additional congressional action may at first glance seem an obvious way to achieve greater national uniformity, at least for federal elections, the reality is that even for these elections, the processes of election administration are likely to remain primarily a state function. It therefore may be more appropriate to respond to the continuing difficulties facing military and overseas voters once again primarily through state laws, if they can promote uniformity. UMOVA would do just that, while also harmonizing with the current federal regime of required assistance for military and overseas voters.

If widely adopted, UMOVA not only would standardize the way in which states assist military and overseas voters in federal elections, in compliance with the federal MOVE Act and UOCAVA, but also would guarantee similar accommodations for state and

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273. See *supra* notes 72–73 and accompanying text.

274. In large part this was a complaint that the Department had yet to establish many of the voting assistance offices mandated by the MOVE Act, which were intended to be a more reliable and accessible source of assistance than the voting assistance officers that had been required under UOCAVA before the MOVE Act. See *supra* note 6.

local elections.<sup>275</sup> It also would cover broader categories of both military voters and overseas voters.<sup>276</sup> And it would give affected voters a right to seek injunctive relief to enforce the act's provisions.<sup>277</sup> UMOVA represents the collective judgment of the hundreds of members of the ULC, assisted by a number of interest groups and observers, and has been approved by the American Bar Association.<sup>278</sup> It deserves widespread adoption around the country.

## V. CONCLUSION

In the ongoing effort to improve our processes of conducting elections, one important value continues to be to provide increased access and convenience—not only for military personnel and overseas civilians but also for all voters. But increased access must remain fair, and increased convenience must remain secure. The history of improvements in military and overseas voting is a testament to the ability of thoughtful policymakers to develop creative and meaningful solutions to the particular difficulties faced by these voters. Some of these innovations also have appropriately found wider application to other voters, and cross-fertilizations will continue to occur. However, states and Congress must pay close attention to the costs, as well as the benefits, of various nontraditional voting methods. Recent controversies surrounding military and overseas voting demonstrate the importance, among other key characteristics, of clear voting rules established in advance, which are attuned to the complexities of our hybrid system. Careful attention to these fundamental principles can make voting more convenient and accessible for all voters, while also keeping the processes of democratic governance fair and reliable.

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275. See *supra* note 78 and accompanying text.

276. See *supra* note 77 and accompanying text.

277. UNIF. MILITARY AND OVERSEAS VOTERS ACT, § 18, 13 U.L.A. 90–91 (Supp. 2012).

278. See *Military and Overseas Voters Act*, *supra* note 8.